KENTUCKY

Third Quarter 2017

Contents

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PENAL CODE

PENAL CODE – KRS 520 - ESCAPE

Jude v. Com. , 2017 WL 3317604 (Ky. App. 2017)

FACTS: While under pretrial house arrest in Lawrence County, Jude left that location and did not return. He failed to report to a scheduled court hearing. He was arrested two months later on an arrest warrant for escape and bail jumping. (His crime occurred in Johnson County, but he was incarcerated in Lawrence County.) Jude took a plea agreement and appealed.

ISSUE: Is home incarceration classified as an alternative to posting bail?

HOLDING: Yes

DISCUSSION: Jude argued that his plea to both escape and bail jumping constituted double jeopardy. The Court noted that he was actually only in the Lawrence proceeding for escape, and

he argued that he could not have been in custody as required for escape, if he was properly charged with bail jumping, which requires that he had been released and did not return. The Court determined that home incarceration was not a release on bail, pursuant to Weaver v. Com.[1] In Tindell v. Com., the Court had agreed that home incarceration was an alternative to bail.[2] Jude argued he posted a bond but he did not in fact present that information to the court.

Notwithstanding, however, the Court agreed that the very favorable plea deal was better than could have been expected given the underlying charges. As such, there was no prejudice and his plea was affirmed.

NON-PENAL CODE

DUI

Jackson v. Com. , 2017 WL 4183241 (Ky. App. 2017)

FACTS: While on his mother's private property in Campbell County, Jackson flipped his truck and injured himself. His mother called 911 and reported he'd been drinking. He smelled of alcohol and refused blood draw. He was taken to the hospital and officers were able to obtain the results of a blood draw.

Jackson was indicted on DUI (fourth offense) and related offenses. He moved to suppress, arguing that the officers lacked consent or a warrant to enter the property and well as the use of the blood test results. The Court denied the motion. Ultimately he was found guilty of driving on a DUI suspended and appealed.

ISSUE: Is it illegal to drive DUI on private property?

HOLDING: Yes

DISCUSSION: Jackson argued that since he was driving on private property, he was not required to have a valid license, since a license is only required to operate a vehicle on a public highway. The Court, however, noted that in KRS 189A.090(1) a person is prohibited from operating in any location, whether public or private, since the General Assembly did not limit the offense to the highway.

The Court upheld his conviction.

[1] 156 S.W.3d 270 (Ky. 2005).
[2] 244 S.W.3d 126 (Ky. App. 2008).

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Booker v. Com., 2017 WL 3971617 (Ky. App. 2017)

FACTS: A search warrant was obtained by Officer Burr (Ashland PD) as a result of a complaint that a 15 year old girl had been sexually abused by Booker. In the search warrant, the girl was referred to only by her initials and her mother was referenced, with no name provided. The search warrant was duly signed by a local judge and executed. Booker was arrested as a result of evidence found.

It was later noted that the mother was, in fact, the signing judge's secretary. Booker argued at a motion to suppress that the judge was not, therefore, neutral and detached. The judge was not available, and in fact, could not, testify about the warrant, but the officer testified that he never shared that information with the judge. The motion was denied and Booker was convicted. He then appealed.

ISSUE: Can a judge be neutral if they aren't aware of the fact that might trigger a bias?

HOLDING: Yes

DISCUSSION: The Court agreed that there was no reason to believe that the judge was aware of the situation and thus, was not aware of any conflict or bias. The Court upheld his conviction.

Yates v. Com., 2017 WL 3447825 (Ky. App. 2017)

FACTS: On August 6, 2012, Det. McBride (Lexington-Fayette Urban County Division of Police) received a tip from a CI that Yates was selling prescription pain medication. He was using a hotel room for the purpose. A controlled buy on August 8, 2012 with the CI netted 11 OxyContin. However, the CI "became unavailable" and the investigation went dormant. A few months later, in January, 2013, another CI reported that Yates (aka Juice) was selling heroin, pills and cocaine. Officers did three trash pulls at Yates' home. Drug paraphernalia, mail, and gun paperwork was found at the first, and more at the second. Another CI provided information about drug trafficking and provided photos of Yates with drugs and a handgun. A similar photo was found on social media.

On April 11, Det. McBride submitted a search warrant, which was issued and promptly executed. Pills and other items were found, along with more than $16,000 in cash. Yates was charged with trafficking and requested suppression. When denied, he took a conditional guilty plea and appealed.

ISSUE: Must a warrant include precise details to be valid?

HOLDING: No

DISCUSSION: Yates argued that the search warrant was "stale and conclusory in nature and did not set forth sufficient particular facts that linked him to the information."[3] The Court agreed that under the Gates test, a judge signing a warrant is expected to look at the totality of the circumstance and apply a common-sense and practical test.[4] The judge must consider "only the four corners of the affidavit." It does not necessarily need to include, for example, the "time and date of any observations on which it relies." The reliability of the first CI was corroborated by the completion of the buy, and the information by the second informant was corroborated by the trash pulls and independent investigation. It was also not conclusory but a simple recitation of the information.

With respect to staleness, the case involved a "course of conduct and activity of a protracted and continuous nature," and in such cases, the "passage of time becomes less significant." Although the white powder observed in the trash was not tested, it could be recognized through context by the experienced detectives. Finally, although the CI's observed drug sales at locations other than the residence, the trash pulls were enough to justify a warrant for the home.

The court upheld the plea.

SEARCH & SEIZURE – PAROLE

Stigall v. Com., 2017 WL 4217352 (Ky. App. 2017)

FACTS: Stigall was released on parole in 2015, and signed an acknowledgement that he was subject to a warrantless search of his person or home if the officer had reasonable suspicion of a criminal offense or parole violation. Two days later, a Probation and Parole Task force, accompanied by local officers, paid a series of "home visits" – Stigall was their ninth stop.

Officer Copher (Probation & Parole) knocked and announced. They received no answer but then heard sounds inside. A TV was turned up and someone looked out the peephole. Copher identified himself and more shuffling inside. Officer Kennedy (LMPD) walked around looking for other exits from that apartment, which was in the basement. He could see through a sheer curtain and watched as the individual "stealthily approach[ed] the table, retrieve and unidentified item and 'sprint' down the hallway." He shared that and the officers made a forced entry, finding heroin, cocaine, marijuana and scales on Stigall. Another person was arrested there as well.

Stigall moved for suppression, arguing that the search and entry exceeded his parole conditions. The Court denied his motion. He took a conditional guilty plea and appealed.

ISSUE: May a parolee's residence be searched with reasonable suspicion?

[3] Com. v. Pride, 302 S.W.3d 43 (Ky. 2010).
[4] Illinois v. Gates, 462 U.S. 213 (1983).

HOLDING: Yes

DISCUSSION: The Court agreed that there is a difference between probation and parole, and "parolees, upon their release, enter into a contract allowing their residence to be searched at any time, even absent reasonable suspicion."[5] The Court agreed the search was valid and upheld his plea.

SEARCH & SEIZURE - CONSENT

Marshall v. Com., 2017 WL 3634482 (Ky. 2017)

FACTS: Three Owsley County officers were trying to serve an arrest warrant on Marshall. They found him at a mobile home. He answered their knock. When they told Marshall had a warrant, he said he needed to get his shoes and heading back into the trailer. An officer grabbed and held him.

From the threshold, the officer later testified he saw an "actively bubbling methamphetamine lab." Marshall denied any knowledge of it but gave consent to a request to be allowed to "look around." The officers confirmed the lab. Marshall, however, claimed that he opened the door before the knock, already wearing shoes, and that he did not give consent for a search. He moved for suppression and was denied. He was convicted of manufacturing methamphetamine and appealed.

ISSUE: Is oral consent for a search sufficient?

HOLDING: Yes

DISCUSSION: The Court agreed that the trial court heard from both sides, and found the arresting officer's testimony to be more credible. The Court agreed that the trial court correctly concluded that the oral consent was sufficient to support the search.

The decision on the suppression was upheld, but did reverse his conviction for possession of drug Paraphernalia (coffee filters containing residue) because of double jeopardy.

SEARCH & SEIZURE – TERRY

Howard-Jones / Mickens v. Com. , 2017 WL 3328114 (Ky. App. 2017)

FACTS: On November 14, 2014, Howard-Jones and Mickens entered a Lexington Kroger, where a loss prevention officer watched then buy gift cards in multiple transactions. Familiar

[5] Kirby v. Lexington Theological Seminary, 426 S.W.3d 597 (Ky. 2014); Bratcher v. Com., 424 S.W.3d 411 (Ky. 2014).

with the process of fraudulently purchasing such cards, he noted that they mixed the card purchases in with the purchase of other small items, consistent with the usual method of such frauds. He contacted Det. Painter (Lexington PD) and obtained the license plate from their vehicle, which was a rental, again consistent with the usual fraud. Det. Painter requested an officer made a traffic stop.

Officer Dellacamera made the stop, and Det. Painter arrived in moments. Howard-Jones, the passenger, was "initially non-complaint" – as he would not roll down the window or open the door, and was "moving around suspiciously and typing on his cell phone." Mickens was frisked and "re-encoded gift cards were found. A further search of Howard-Jones revealed the same. Mickens consented to a vehicle search and 893 gift cards were found; 733 had been re-encoded.

The pair were charged with Trafficking in Financial Information, False Making or Embossing of Credit or Debit Card, and 101 counts of Criminal Possession of a Forged Instrument. Both moved to suppress, which was denied. Both took conditional guilty pleas and appealed.

ISSUE: May an experienced LP officer provide reasonable suspicion for a traffic stop?

HOLDING: Yes

DISCUSSION: The parties argued that their behavior at the store did not rise to the level of reasonable suspicion to justify the traffic stop. The Court, however, found that the information available, from a known and reliable tipster (the loss prevention officer) who had been trained in credit card fraud, was sufficient to justify the stop.

The Court affirmed the pleas.

SEARCH & SEIZURE – TRAFFIC STOP

Chambers v. Com., 2017 WL 4334110 (Ky. App. 2017)

FACTS: On January 14, 2015, Officers Thurman, Kennedy and Stafford (Lexington PD) were in an unmarked vehicle when they approached an apparent narcotics transaction. The group dispersed and the suspect vehicle drove off. (Officer Thurman's unmarked vehicle was well-known.) They followed the vehicle, with three occupants. After noting the license and that it was speeding, and getting an idea of the driver, they stopped following as the speed was becoming a hazard. Officer Thurman put out a BOLO on the vehicle.

Officer Ray located the vehicle. At that time, he only knew for sure about the traffic violations, but suspected more as he was familiar with the area. Officer Ray began a traffic stop and observed the front passenger making suspicious movements. He was concerned about weapons. Officer Ray interacted with the driver and obtained some documents, but was cautious until the other officers arrived. Officer Ray explained about the passenger's actions – Chambers – and

asked Officer Stafford to get the passenger from the vehicle. He did so and ultimately, a handgun was found in a frisk.

Chambers, a convicted felon, was arrested for the gun, and heroin was later also found on his body. Chambers moved for suppression, arguing the traffic stop was "unduly prolonged." The trial court disagreed, finding the detail based on reasonable suspicion. Chambers took a conditional guilty plea and appealed.

ISSUE: Is furtive movements during a traffic stop enough for a Terry frisk?

HOLDING: Yes

DISCUSSION: Chambers argued that the observations of his movements, lifting up and reaching under his body and "digging around" the seat were not enough to be reasonable suspicion that he was armed and dangerous. The Court looked to Terry and to Com. v. Banks[6] and agreed that the purpose of Terry was "not to discover evidence of a crime but to allow the officer to investigate 'without fear of violence or physical harm.'"[7] A frisk is not automatic, but must be based, however, on reasonable suspicion.

The Court looked to Arizona v. Johnson, which agreed that a lawful stop occurs in a vehicle situation and that all occupants are thus seized as well.[8] Simple occupancy in the vehicle was not enough for a frisk, nor was nervousness, but, in this case, additional facts about furtive movements were present and was sufficient for a frisk.

The Court also agreed that the delay (six minutes) for the arrival of other officers, was also justified, as it is "appropriate to delay the completion of [a] stop based on safety concerns, so that an officer may obtain back-up," and to await other officers to aid in completing the investigation. (In fact, since the vehicle was rented and they could not find the agreement, and because the driver had no license, "the traffic stop became complicated and required more time to complete.")

The Court affirmed his conviction.

Clay v. Com., 2017 WL 4082784 (Ky. App. 2017)

FACTS: One late evening, Officer Ray (Lexington PD) spotted a vehicle speeding. When the driver noticed Ray, he slowed down to ten miles under the limit. Thinking he might be intoxicated, Ray made a traffic stop. Clay, the driver, immediately produced his documents. Officer Ray realized he was not intoxicated, but suspected other criminal activity due to Clay's abrupt slowing. He learned that Clay had a narcotics criminal history. He called for a K9 unit

[6] 68 S.W.3d 347 (Ky. 2001).
[7] Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).
[8] 555 U.S. 323 (2009).

immediately. All of the above, including verification of valid OL and insurance, occurred within minutes of the stop.

Clay indicated there was a problem with his car and he was on the way to get a part. He declined consent to search. Officer Ray proceeded to write the speeding citation and Officer Moore arrived with his drug dog. Within moments, the dog alerted and a small quantity of crack cocaine was found. Clay admitted to marijuana as well. He was cited and released.

Clay moved to suppress, but the Court held he was not illegally detained to extend the dog sniff. He took a conditional plea to possession of marijuana and appealed.

ISSUE: Is a dog sniff during a valid traffic stop proper?

HOLDING: Yes

DISCUSSION: The Court agreed that the "tolerable duration of police inquiries in the traffic-stop context" is determined by the nature of the stop – traffic. If reasonable suspicion develops, however, the officer is able to prolong the stop to investigate. In this case, the court agreed that the dog sniff occurred during the context of completing a speeding citation, and it was during that time that the K9 alerted. Once the dog alerted, he had reason to extend the stop.

The Court upheld the denial.

Williams v. Com., 2017 WL 3927068 (Ky. App. 2017)

FACTS: On September 30, 2014, Williams and Palmer (his girlfriend) travelled from Cincinnati to Newport, to Palmer's home. Anderson, an unlicensed taxi driver, transported them. At about 3 a.m., Officer Boyd, Newport PD) spotted the vehicle as having only one headlight and made a traffic stop. When Anderson rolled down the window. Officer Boyd "was met with a strong smell of marijuana." He also spotted "shake" – marijuana residue – on the rear seat behind the driver. All three were removed from the vehicle and searched, as dispatch was checking on their names. He found a single bullet on Williams. Officer Gallichio, his K9, and Officer Roller also arrived.

The K9 alerted and Anderson consented to a search. A glass pipe was found in the driver's side door, as well as a bag on the floorboard behind the driver's seat. The bag contained a handgun. Officer Roller checked it and founded it loaded, but minus one cartridge to being at maximum capacity. The rounds were identical to the one found on Williams. Anderson was cited for driving on suspended and paraphernalia and left on foot. Williams was given Miranda and questioned, he also admitted he owned the gun and was a convicted felon.

Williams was charged and convicted of possession of the handgun. He then appealed.

ISSUE: Is the odor of marijuana sufficient for an automobile exception search?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that the smell of the marijuana was sufficient to trigger the "automobile exception."[9] Williams argued that was insufficient to allow a search of the occupants, and that "individualized suspicion" instead, was needed. The Court noted that the weapon was found "through a series of events that began with the smell of marijuana emanating from the vehicle." Further, the court agreed that he was properly linked to the weapon, in constructive possession. In fact, he even admitted it at one point.

The Court agreed that the search was proper and affirmed his conviction.

Mundy v. Com., 526 S.W.3d 120 (Ky. App. 2017)

FACTS: On the day in question, Connor called 911 to report her car stolen. Officer Corbett (Richmond PD) was told that she was pursuing the stolen car on I-75. The officer found two unoccupied vehicles on the shoulder, with a woman (Connor) and three men (one of whom was Mundy). Officer Corbett collected ID from all parties and went to check on the status of each. Other officers questioned the four and learned the Connor has loaned her car to her boyfriend and that he'd allowed the other men to drive it. Since they lacked permission to drive it, she considered it stolen. She did not want to charge them with theft, however.

During the process, Officer Corbett learned Hill, the driver, had a suspended OL. He was arrested. He spotted Mundy moving his hands down into his pants and he and Officer Riley tackled Mundy. A quick search revealed a pistol and crack cocaine. There was dispute into the time of the arrest, but it was within an hour of the officer's interaction with the four.

Mundy was charged. He argued that although the stop was lawful, he should have been immediately released when Connor explained the circumstances of the supposed theft. The Court denied the suppression. Mundy took a conditional guilty plea and appealed.

ISSUE: May an investigation lengthen a traffic stop?

HOLDING: Yes

DISCUSSION: The Commonwealth noted this wasn't a "traffic stop" in the usual sense, but a possible car theft. While doing so, a lawful arrest was made of another person, and at the same time, Mundy took actions that caused legitimate concern to the officers present. As such, he was not unreasonably detained and frisked.[10] In this case, they were investigating a "potentially volatile and dangerous situation" and there was no indication they held Mundy longer than reasonable necessary.

[9] Dunn. v. Com., 199 S.W.3d 775 (Ky. App. 2006).
[10] Williams v. Com., 364 S.W.3d 65 (Ky. 2011).

Hill v. Com., 2017 WL 3328117 (Ky. App. 2017)

FACTS: Following several transactions involving an "unknown male" who was driving a "black Hertz rental car with Tennessee plates," Det. Johnson directed a uniformed officer to make a traffic stop if he observed a traffic violation. The officer reported back that the driver was Hill and he was alone, although the vehicle was rented to a female named Allen. The detective showed an OL photo of Hill to the informant, who agreed that was who sold him the drugs. Since Hill was on parole, when he came in for a meeting, Det. Johnson arrested him.

Det. Johnson took the car keys he had in his possession, which included a Hertz rental key. It did not have GPS tracking, but when they tracked the person he called several times from jail, they found the vehicle at her residence, parked on the street. A K9 alerted but no drugs were found in the car. However, Hill's ID and cell phone were found, and his cell phone rang when they called the number the informant provided for his dealer.

Hill was charged with trafficking and argued that the rental vehicle was improperly searched. The Commonwealth argued he lacked standing, since he did not rent the vehicle, and even if he did, the dog sniff justified the search. The Court upheld it under the automobile exception search and Hill appealed.

ISSUE: Does a vehicle have to be able to be moved at a particular moment in order to be "readily mobile" for the automobile exception?

HOLDING: No

DISCUSSION: The Court looked to the privacy interests of individuals in their vehicles and noted that one of the exceptions to the warrant requirement was the automobile exception.[11] For that type of search, a vehicle may be searched if there is probable cause to believe it contains contraband.[12] Hill conceded that the dog did provide probable cause, but he argued the vehicle was not readily mobile – presumably because Det. Johnson had the key.

The Court noted that being readily mobile was discussed in Chavies v. Com.[13] In that case, the Court defined it as the "capability of using an automobile on the highways, not the probability that it will be used to do so." The Court noted that the authorized renter could have another key, and of course, Hertz could have taken possession of it as well. It was immaterial that the detective had a key or that Hill was in custody.

The Court agreed is motion to suppress was properly denied.

Sorrels v. Com. , 2017 WL 3446978 **Ky. App. 2017**

[11] Carroll v. U.S., 267 U.S. 132 (1925).
[12] Pennsylvania v. Labron, 518 U.S. 938 (1996).
[13] 354 S.W. 3d 103 (Ky. 2011).

FACTS: On October 1, 2015, Trooper McGehee (KSP) was on duty near Greenville. He observed a vehicle fail to signal a turn, twice. He made a traffic stop. The driver identified that the vehicle, a van, belonged to the passenger, Sorrels. The trooper was familiar with Sorrels' prior criminal history and drug crimes, and that he'd been trafficking from the van. As the trooper had Sorrels get out, he noted a green pill and what appeared to be residue on the passenger's side floorboard. Trooper Fortney arrived and requested the Muhlenberg County Sheriff's Office, Deputy Ward, and his K9, within minutes, and the dog immediately alerted. A handgun and non-controlled prescription medication was found.

Sorrels, a convicted felon, was charged with the firearm. He moved for suppression of the search. The court upheld the search and Sorrels took a conditional guilty plea. He then appealed.

ISSUE: Is plain view of suspect contraband sufficient to hold a vehicle for a dog sniff?

HOLDING: Yes

DISCUSSION: Sorrels argued that the police lacked sufficient reasonable articulable suspicion to detain him during the traffic stop. The Commonwealth argued that the trooper knew Sorrels and his drug-related criminal history. Although the information was not fully fleshed out, the defense did not take advantage of the opportunity to fully examine the trooper at the suppression hearing.

The Court agreed that the detention and request that Sorrels get out was proper. [14] He had a reasonable articulable suspicion because he recognized Sorrels from prior interactions. The demand that he get out was also proper under Maryland v. Wilson.[15]

Looking at the dog sniff, the Court agreed that his plain view of suspect contraband was more than enough to extend the stop to wait for the dog.

The Court upheld the plea.

SEARCH & SEIZURE – TRAFFIC STOP / ROADBLOCKS

Runyon v. Com., 2017 WL 3575588 (Ky. App. 2017)

FACTS: On September 27, 2015, a sobriety checkpoint was set up by the Martin County Sheriff's Office. They had prior approval and used a usual checkpoint location. They had just arrived when Runyon approached. As they had just arrived, no warning signs or lights were in place, although at least one of the deputies was wearing a reflective vest. There had been no

[14] Arizona v. Johnson, 555 U.S. 323 (2009).
[15] 519 U.S. 408 (1997).

media announcement. One of the deputies tried to flag him down with a flashlight and Runyon seemed to slow, but then passed at what the deputies thought was a high rate of speed. One heard the engine rev as he "narrowly passed."

The deputies pursued and stopped Runyon. He was charged with DUI, Fleeing and Evading 1st and carrying a concealed weapon. He moved to suppress, arguing that the checkpoint was unconstitutional under Com. v. Cox.[16] The trial court looked to whether Cox would apply retroactively to the stop, given that it was rendered after that date, and if so, whether Cox "extended Com. v. Buchanon to now mandate signage or media notice."[17] The Court decided it did not matter, however, as Runyon "fled the scene and did not stop at the checkpoint."

Runyon took a conditional guilty plea and appealed.

ISSUE: Is signs, lights and media notice mandatory for a roadblock?

HOLDING: Yes

DISCUSSION: The Court looked to the basic precepts of Buchanon, and specifically, the third factor. Buchanon requires that the "nature of the roadblock should be readily apparent to the approaching motorists." Cox extends that to be read that warning signs, emergency lights and media notice are mandatory.

The Court, however, agreed that neither actually applied, as Runyon did not stop at the checkpoint. Instead, the attempt to stop was covered by Terry v. Ohio, and required only an objective reasonable suspicion for the stop.[18] His failure to stop at a signal to do so, and subsequent acceleration from the scene, was sufficient to trigger Terry. Had he stopped, he could possibly have raised the issue of the constitutionality of the stop, but that was no what happened in this case.

The court upheld the plea.

INTERROGATION

Rohrback v. Com., 2017 WL 3634330 (Ky. 2017)

FACTS: On March 31, 2014, Det. Muse (Maysville PD) was investigating a rape. He visited Rohrback and asked if he would come to the police station, which was directly across the street. He agreed. At the beginning of the interview, Muse told Rohrback that he was free to leave and gave him Miranda warnings. When a polygraph was mentioned, Rohrback stated he wanted to

[16] 491 S.W.3d 167 (Ky. 2015).
[17] 122 S.W.3d 565 (Ky. 2003).
[18] 392 U.S. 1 (1968); Bauder v. Com., 299 S.W.3d 588 (Ky. 2009); U.S. v. Sokolow, 490 U.S. 1 (1989).

leave. Muse continued his questioning. Finally, he asked if he could photograph Rohrback's apartment. He agreed and they returned.

Several hours later, Rohrback returned and asked to speak with Det. Muse. He was reminded he was free to leave and was not given warnings. Rohrback gave several incriminating statements and returned home. Det. Muse visited him again and asked if he was willing to write a letter of apology to the victim, and Rohrback came to the station and did so. It too included incriminating statements. He was arrested.

Rohrback was indicted for rape, sexual abuse and PFO. He moved to suppress his statements, but the Court concluded that he was not in custody at the time. (The Court also heard testimony on a statement he made to a social worker after his arrest, but that was held inadmissible as he had not been given Miranda and was subjected to a custodial interview by a state actor.) Rohrback took a conditional guilty plea to rape and appealed.

ISSUE: Is Miranda required in a non-custodial interview?

HOLDING: No

DISCUSSION: Although Rohrback argued that he received inadequate warnings, the Court agreed that he was not even entitled to Miranda warnings as he wasn't in custody. In the first interview, he acceded to a request for an interview and voluntarily accompanied the detective to the station. Eventually, he left on his own. He returned on his own for the second interview. In the third, he agreed to write a letter and was left alone to do so. Although it was unclear if he would have been permitted to leave the station had he not written the letter, that was not determinative.

As he was not in custody, he was not entitled to Miranda. With respect to his alleged invocation of his right to silence, Det. Muse ignored this and continued his interrogation. The Court agreed he did seek to stop the interview. However, the detective 'was only required to cease his questioning if Rohrback asserted his right to silence while being the subject of a custodial interrogation."[19] He was, at all times, simply free to leave.

On an unrelated note, the court agreed that there was no indication that Det. Muse made any plea offers or negotiations. The court upheld Rohrback's conviction.

Simms v. Com., 529 S.W.3d 301 (Ky. App. 2017)

FACTS: S.R., age 12, told a friend she had a sexual encounter with Simms, her adult cousin, while he was babysitting in Carter County. Eventually KSP became involved. Det. Boarman interviewed Simms who denied rape, but agreed he'd been babysitting her. A medical exam indicated trauma consistent with sex. Boarman was directed by Simms to speak to Click, the

[19] Springer v. Com., 998 S.W.2d 439 (Ky. 1999); McNeil v. Wisconsin, 501 U.S. 171 (1991).

child's aunt, who told the detective that S.R. had recanted. On a second interview with Det. Boarman, S.R. did so.

A few weeks later, she was shown to have a STD and was removed from the home. On a third interview, S.R. reaffirmed the rape allegations and explained Click had pressured her. Simms, voluntarily, was also tested and found to have the same STD. He agreed to be interviewed and drove to the post. He was told he could leave at any time. Ultimately, he admitted oral sex and then ended the interview, and left. He was arrested the next day.

Simms was charged with Rape, Sodomy and Sexual Abuse. He moved for suppression, claiming he'd been subjected to a custodial interrogation without Miranda rights. The Court denied the motion. He was convicted of Sexual Abuse (consistent with S.R.'s trial testimony) and appealed.

ISSUE: Is an interview custodial simply because the subject is a suspect?

HOLDING: No

DISCUSSION: The Court looked at the facts presented and weighed each in turn. The Court agreed that it was not custodial just because he was a suspect because of course, police are able to interview identified suspects. Although Kentucky recognizes some degree of presumption of custody in a police interrogation room, it can be overcome if it is shown, as it was here, that the defendant was free to leave. (In fact, at one point, the interrogation moved outside so he could smoke.) Since he was not in custody, Miranda was not required.

The Court upheld his plea.

Goodman v. Com., 2017 WL 3927052 (Ky. App. 2017)

FACTS: Following Goodman's arrest in Louisville in 2014, he was interviewed by Det. Crowell. He signed a written waiver of Miranda and gave a recorded confession, agreeing he'd robbed a Taco Bell. He later moved for suppression, however, claiming that he'd requested an attorney before the recording began. Crowell denied it, however. Goodman testified that he'd told a female and male officer that he wanted to speak to his attorney. He agreed he did not mention it during the recorded interview because "he wanted to leave." The trial court found the officer more credible and denied the motion.

Booker took a conditional guilty plea and appealed.

ISSUE: May a trial court make a credibility determination as to whether a subject asked for an attorney?

HOLDING: Yes

DISCUSSION: The Court looked to the evidence and noted that "aside from Goodman's self-serving testimony," there was no indication the waiver was obtained by coercion. He was calm and alert and agreed he was giving his statement freely.

The Court upheld his plea.

Norvell v. Com., 2017 WL 2992365 (Ky. App. 2017)

FACTS: Norvell was indicted on Rape and Incest, but took a plea to non-forcible Incest. Following that, he moved for relief from the judgement, as the victim had recanted. Norvell had, during interrogation, however, confessed to the sexual contact. The trial court had refused his demand for a hearing and Norvell appealed.

ISSUE: May a person under the influence still be questioned?

HOLDING: Yes

DISCUSSION: Norvell argued that he was under the influence of drugs and alcohol when he was questioned by law enforcement, making his plea invalid. (Days before he entered his plea, he'd been in the hospital for an overdose, in fact.)

The Court noted that the video of the plea colloquy indicated he properly interacted with the court during the process. The audio recorded interview also clearly indicated that he had his "faculties about him" and was properly given Miranda prior to his statement, and nothing suggested he was laboring under any intoxication or other infirmity at the time.

The Court upheld his plea.

SUSPECT IDENTIFICATION

Fairley v. Com., 527 S.W.3d 792 (Ky. 2017)

FACTS: Page was allegedly assaulted and robbed in Hopkinsville. Tips suggested Fairley was involved and Fairley was discovered to have been on HIP and wearing an ankle monitor. Further investigation placed him at the location of the robbery and moving away from that location, as the victim and witnesses indicated.

Fairley claimed to have been submitted an employment application at the time. Tracking him the following day, he was found in close proximity, in the same vehicle, as a stolen gun. He gave conflicting statements, first saying he'd been home at the time of the robbery, and then that he'd seen the assault and given someone a ride away from the scene. Search of a blue vehicle, registered to his mother, recovered cocaine and marijuana, and blood stained socks that matched with Page.

At trial, Page, who had not identified Fairley in a photo array, was allowed to identify him in court. (Page later explained that he was afraid of Fairley, and had also gotten the stolen money through illegal gambling.)

Fairley was convicted of Robbery and related offenses. He then appealed.

ISSUE: If a witness does not make an identification from a photo array, does that invalidate a later in-person identification?

HOLDING: No

DISCUSSION: The Court agreed "the failure of a witness to identify a suspect from a photographic line-up does not prevent that witness from later identifying a suspect in court."[20]

Specifically, in the Sixth Circuit:

> The fact that eye witnesses to an occurrence cannot make a positive .identification "of an individual from an examination of photographs of a number of persons, does not necessarily detract from the validity of their in-court identification where they see the individual in person. The weight to be given to their in-court identification is for the jury to determine.[21]

In this case, Fairley had an opportunity to cross-examine Page as to inconsistencies and it was fair to allow the jury to make a decision as to the validity of the identification. The Court agreed that "although the relatively recent opinion in Perry v. New Hampshire[22] did not involve an in-court identification (and thus did not settle the debate beyond the requirements of federal due process on the facts . presented), it does give strong support for the limitation of Biggers, as well as its predecessors and progeny, to out-of-court identifications resulting from suggestive circumstances arranged by the police."[23] The Court agreed that it would not extend Biggers to in-court identifications.

The Court also agreed that it was proper to charge him with the stolen firearm, located in the vehicle he was occupying alone. Although it had been stolen 15 months before, that was sufficient to indicate he knew it was stolen, under the presumptions in KRS 514.

The Court upheld his conviction.

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[20] Thompson v. Commonwealth, 2003-SC-0252-MR, 2004 WL 2624165, 6 (Ky. 2004) (citing U.S. v. Dobson, 512 F.2d 615 (6th Cir. 1975)); U.S. v. Briggs, 700 F.2d 408 (7th Cir. 1983)).
[21] U.S. v. Black, 412 F.2d 687 (6th Cir. 1969).
[22] 565 U.S. 228 (2012).
[23] Neil v. Biggers, 409 U.S. 188 (1972).

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Stovall v. Com., 2017 WL 3632105 (Ky. 2017)

FACTS: During Stovall's trial for sexual abuse, a detective from Louisville Metro PD was asked if he ever attempted to make contact with Stovall to get his side of the story. Before the detective could answer, the defense objected and requested a mistrial. The Court sustained the objection but did not give a mistrial. (Stovall did not ask for or receive an admonition.)

Stovall was convicted and appealed.

ISSUE: Is it improper to comment on a person's right to silence?

HOLDING: Yes

DISCUSSION: Stovall argued that he should have received a mistrial. The Court, however, noted that the objection stopped the testimony and that any error was harmless. Had he asked for an admonition, he would have been entitled to one, but he did not do so.

The Court upheld his conviction.

Parker v. Com., 2017 WL 3822894 (Ky. App. 2017)

FACTS: On May 30, 2013, drug task force officers (KSP / Paris PD) did a search warrant at Adams home. She was charged with trafficking and agreed to cooperate as a witness against Parker. She sent a text message and set up a meeting to buy 100 Oxycodone pills. Parker arrived and was promptly arrested. He had the pills and over $10,000 in cash in his possession, and well as a cell phone.

Parker was charged with trafficking. At trial, Lt. Puckett testified as to the items seized and offered expert testimony about the "general practices" used by traffickers. Puckett was an experienced narcotics officer. The Court allowed the expert testimony.

Parker was convicted and appealed.

ISSUE: May an officer serve as an expert witness on drug trafficking?

HOLDING: Yes

DISCUSSION: The Court discussed the use of such testimony, under KRE 702. The Court found Puckett was "clearly qualified to testify as an expert regarding the general practices of drug

traffickers." The Court agreed that his testimony was relevant to assist the jury's understanding "aspects of drug culture outside the common knowledge of most jurors and tended to prove Parker possessed the oxycodone for the purpose of selling it."[24]

Parson v. Com., 2017 WL 3129178 (Ky. App. 2017)

FACTS: In April, 2013, Parson allegedly subjected T.T., age six, to sexual contact. At the time, he and his fiancée, Crystal, lived with her mother and stepfather in Covington, along with a total of seven children. T.T. was the daughter of the stepfather's son's girlfriend, whom the mother and stepfather were fostering. T.T. testified that Parson had digitally penetrated her and that she told her mother the next day, while visiting her at a drug treatment facility.

Both Williamson, a social worker, and Det. Bradbury, Covington PD, testified as to what T.T. had told them, and verified that she had visited her mother on April 27, 2013. Parson submitted witnesses as to his whereabouts on the day in question, and indicated he was not home that day.

Parson was convicted and appealed.

ISSUE: Is testimony about prior inconsistent statements admissible?

HOLDING: No

DISCUSSION: Parson argued that the testimony from Williamson and Bradbury was hearsay and improperly admitted "prior consistent statements."

The Court agreed that "a witness cannot vouch for the truthfulness of another witness."[25] Specifically, it has been held to be improper for both social workers and police officers to do so.[26] As there was no claim of a recent fabrication by the child, the statements were clearly improperly admitted.

However, the court noted that such hearsay is "highly prejudicial because it unfairly bolsters the credibility of the victim." As the victim's statement was the only evidence that linked Parsons' to the alleged crime, and there was no other supporting evidence, the Court reversed the conviction and remanded the case.

The Court upheld his conviction.

[24] Burdell v. Com., 990 S.W.2d 628 (Ky. 1999).
[25] Hoff v. Com., 394 S.W.3d 368 (Ky. 2011).
[26] Sanderson v. Com., 291 S.W.3d 610 (Ky. 2009); Alford v. Com., 338 S.W.3d 240 (Ky. 2011); Smith v. Com., 920 S.W.3d 514 (Ky. 1995).

Nance v. Com., 2017 WL 3634582 (Ky. 2017)

FACTS: Nance was charged with Burglary, Wanton Endangerment and related offenses in a break-in, during which he brandished weapons. Among other issues, several witnesses testified, at least one as a hostile witness. Nance was convicted and appealed.

ISSUE: Is it proper to read from transcripts?

HOLDING: No (but see discussion)

DISCUSSION: Nance objected to two of the witnesses being alone to read from the written transcript of their interviews, rather than testifying from their own memory. Two of the witnesses were highly reluctant to testify, and could not describe the events in her own words. Both eventually, were allowed to read from the transcript as they claimed to recall nothing from the incident.

Nance argued that the transcripts could only be used to refresh their recollection, and that the transcript was unvetted and unofficial. The Commonwealth asked the witnesses whether they made certain statements, as reflected in the transcript. The transcript was admitted and in fact, he also used the transcript during cross.

The court looked at KRE 612 and 803(5). The first addresses the refreshing of memory during testimony and generally, in that situation, the document itself is not admitted. However, if the writing does not successfully refresh the memory, KRE 803(5) applies, and can be used to allow the content of "previously written recordings to be admitted as substantive evidence to prove the truth of the matter asserted in the recording." That writing must be "adopted by the witness as an accurate reflection of person knowledge the witness once possessed." In this case, the investigator verified the transcript's accuracy, as compared to the recorded interview.

After addressing several other issues, the court upheld his conviction.

Weston v. Com., 2017 WL 4220060 (Ky. App. 2017)

FACTS: In December, 2015, Det. Hoover (Russell County SO) used Lee, a CI, to make controlled buys. He earned money for making the buys. The detective knew he was a methamphetamine user but did not realize Lee had an outstanding warrant. Lee made a controlled buy from Weston. During the transaction, he lost sight of him for some minutes but then witnessed what he believed to be a transaction. Lee delivered three bags of methamphetamine. A second buy was also made a few days later.

Weston was indicted, and ultimately convicted, of trafficking. He appealed.

ISSUE: Is the decision on credibility of a witness up to the jury?

HOLDING: Yes

DISCUSSION: Weston argued that Lee's testimony was untrustworthy and should have been discounted. The trial court, however, properly placed the matter before the jury, which heard a "reasonably complete" accounting of his character, veracity, bias and motivation for acting as a CI. They were also aware that he was being paid for his information.

The Court upheld his conviction.

Com. v. Miles, 2017 WL 5504212 (Ky. 2017)

FACTS: Miles was charged in the killing of Teasley, in Shively. At trial, there was an objection made to hearsay testimony, by a detective, which was overruled. Miles was convicted and appealed. The Court of Appeals reversed his conviction and the Commonwealth appealed.

ISSUE: Is it proper to testify about an identification when the person who made the identification does not testify?

HOLDING: No

DISCUSSION: Among other issues, Det. Ashby (Shively PD) "testified that a man named Reggie Burney had identified Miles from a photo pack as being the individual in a fight with Teasley on the night of his murder." Burney did not testify himself but no objection was made to the statement. The Court agreed that the testimony was not of such import, although it was improper and an objection to it should have been sustained, if made.

The Court reversed the lower court and reinstated the conviction.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Phelps v. Com., 2017 WL 4334109 (Ky. App. 2017)

FACTS: In 2014, Taylor learned that her house had been burglarized and a number of items stolen. LMPD was called and they reviewed her surveillance video, which clearly showed the intruder. In addition to providing the information to the police, she also distributed them to pawn shops and via Facebook, which resulted in a tip that led to Hatfield, who was married to Phelps. Det. Bird (LMPD) interviewed Hatfield, who agreed the vehicle in the video was hers but she had no involvement in the crime. She identified Phelps as the man in the video and agreed that at the time, he'd given her a TV and a bottle of collectible liquor, both among the items stolen, to give him a ride. (They were separated at the time.) Phelps was located and arrested.

In the ten days before trial, discovery was provided to Phelps, including copies of the Facebook posts, etc. Phelps requested exclusion due to the delay in providing the information and some was excluded. He was convicted and appealed.

ISSUE: May late discovery cause the exclusion of evidence?

HOLDING: Yes

DISCUSSION: Phelps argued that the decision on the evidence was inconsistent. The Court noted that the items that were excluded "had inexplicably not been sought by police until the eve of trial and only then at the suggestion of the prosecutor." The Facebook posts, which were admitted, were cumulative and were so heavily redacted that all that remained were photos of missing items and stills from the video. The information was essentially visual representations of what was already in the discovery, and provided nothing new.

The Court affirmed his conviction.

Neal v. Com., 2017 WL 3951899 (Ky. App. 2017)

FACTS: On August 18, 2014, Officer Raifsnider (Louisville Metro PD) responded to a robbery call at a local Speedway. He took a report and obtained a description and direction of travel. As the officer left the area, he made an unrelated traffic stop of a vehicle, with Neal as the driver. The next day, when the officer obtained the video of the robbery, he recognized Neal as the robber, and also connected him to several other robberies in the area. A search warrant was obtained for his home and incriminating items were found. Neal was charged with five robberies and with cocaine found during the investigation.

Neal was convicted and appealed.

ISSUE: May drugs found during a search incident be revealed during the trial for the original offense?

HOLDING: Yes

DISCUSSION: Neal argued that the traffic stop was improper and that as a result, attention focused on him. The Court noted that in fact, he did not make the motion during the trial and it could not review it.

He also argued that it was improper to introduce evidence of the cocaine during his trial, as it was not connected to the robberies. However, it was found on Neal during the search of his person, and in close temporal proximity to the crime. As such, the court agreed it was proper to admit it.

Neal's convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE – CELL PHONE DATA

Holbrook v. Com., 525 S.W.3d 73 (Ky. 2017)

FACTS: In 2011, Harris discovered Bryant's body floating in a pond on the Holbrook farm in Elliott County. He'd been reported missing a month before. Harris explained he'd seen tracks leading to ponds in the area after that time. Bryant had been shot twice.

Holbrook was interviewed during the investigation into the disappearance and again, after the body was found. Holbrook claimed Bryant had been in an altercation with Camacho before his death. Two years later, he was charged and the case removed to Morgan County. A number of witnesses testified, including one that allegedly told a KSP detective that Holbrook and Camacho together murdered Bryant over drugs.

Holbrook was convicted and appealed.

ISSUE: May a qualified expert testify as to cell phone tower data?

HOLDING: Yes

DISCUSSION: Among other evidence, Special Agent Horan (FBI) testified about historical data analysis of cell tower and cell phone records, as an expert.

The admissibility of expert testimony is governed by Kentucky Rule of Evidence (KRE) 702. That rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine _a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principle and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

KRE 702 is based in "Daubert v. Merrell Dow Pharm., Inc.[27] Daubert requires the trial court to play the role of "gatekeeper" to prevent the admission of "unreliable pseudoscientific evidence."[28] The Court noted that to understand the issues, "a brief explanation of the intersection of cell phones and cell phone towers is necessary. Cell phones work by

[27] 509 U.S. 579 (1993).

[28] Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004). "[A] trial court's task in assessing proffered expert testimony is to determine whether the testimony 'both rests on a reliable foundation and is relevant to the task at hand. Futrell v. Commonwealth, 471 S.W.3d 258 (Ky. 2015)

communicating with cell-sites operated by cell-phone service providers. Each cell-site operates at a certain location and covers a certain range of distance."[29] /

The geographic area covered by a particular tower depends upon "the number of antennas operating on the cell site, the height of the antennas, topography of the surrounding land, and obstructions (both natural and manmade)."[30]

> "When a cell phone user makes a call, the phone generally 'connect[s) to · the cell site with the strongest signal,' although 'adjoining cell [towers) provide some overlap in coverage.'" "As a cell phone user moves from place to place, the cell phone automatically switches to the tower that provides the best reception."[31]
>
> Due to practical and technical necessity, "cell-phone service providers keep historical records of which cell-sites each of their users' cell phones have communicated." Review of a cell tower's location data "does not identify a cell phone user's location with pinpoint precision-it identifies the cell tower that routed the user's call."[32] "[Historical cell-site data] makes it possible to identify at least the general location of a cell phone at the time the phone connects to a tower." A cell user's location "may be further defined by the sector of a given cell tower which relays the cell user's signal, the user may be anywhere in that sector."

Prior to trial, the agent's qualifications were closely examined. "He was a member of the FBI's Cellular Analysis Survey Team (CAST). CAST was created to analyze various historical records associated with the use of cell phones including cell phone records, tracking cell phones through cell tower records, and analyzing cell phones. CAST agents undergo one month of training, along with continuing education and updates from professionals in the cell phone industry." That, plus additional training, qualified him as an expert. He was allowed to testify as to how cell phones communicate.

At trial, he testified as to what he could know about the two cell phones (Holbrook's and Bryant's) and what he could not know for sure. He also analyzed Camacho's phone (and that of another individual) and did not place them in the same area. The Court noted that in a Seventh Circuit case, the court had agreed that the "that the "science is well understood" and "the technique [of cell phone location analysis] has been subjected to publication and peer criticism, if not peer review." Most important, and consistent with that case, the agent was careful to identify the limitations in the science. The Court upheld the testimony.

In another issue, the Court noted that Det. Bowling (KSP) had, in response to a question, said he didn't think he was being truthful. The Court noted:

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[29] In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113 (E.D.N.Y. 2011).
[30] U.S. v. Hill, 818 F.3d 289, 295 (7th Cir. 2016) (quoting Aaron Blank, The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of A Cellular Phone, 18 RICH. J.L. & TECH. 3, 5 (2011)).
[31] State v. Johnson, 797 S.E.2d 557,562 (W.Va. 2017) (quoting In re Application of U.S. for an Order for Disclosure of Telecomms. Records & Authorizing the Use of a Pen Register & Trap & Trace, 405 F. Supp. 2d 435 (S.D.N.Y. 2005)).
[32] U.S. v. Davis, 785 F.3d 498,515 (11th Cir.); *see also* State v. Simmons, 143 A.3d 819 (Me. 2016)

> … with few exceptions, it is improper to require a witness to comment on the credibility of another witness. A witness's opinion about the truth of the testimony of another witness is not permitted. We reiterated these principles, set forth in Moss, eight years later in Lanham v. Commonwealth, by saying that "it is generally improper for a witness to characterize the testimony of another witness as 'lying' or otherwise."[33] However, the Court noted an exception, for raw, recorded interrogations, in which the interrogator accuses the subject of not being truthful. It was in that context that Bowling's statement was made, with the detective repeating what was said in an interrogation, and as such, the Court agreed that part was permissible. His extraneous comment that he did not think that Holbrook was being truth was, however, improper, and should have been excluded, but was also, harmless in the context of the two week trial.

The Court also upheld the admission of graphic photos of Bryant's body, as well, as incriminating statements made by Holbrook to three men. The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Wilson v. Com., 2017 WL 4310499 (Ky. 2017)

FACTS: During Wilson's trial, Det. Newman was called to testify about the use of a CI. Although the credibility and reliability of the informant had not been challenged, Newman attested to it. Wilson did not object, however, at the time. Following his conviction, Wilson appealed.

ISSUE: May a witness "bolster" another witness?

HOLDING: No

DISCUSSION: Both sides agreed that "the prosecution improperly bolstered the credibility of the confidential informant without his credibility having been attacked and through specific instances of conduct unrelated to truthfulness and untruthfulness." However, since there was other evidence of Wilson's crimes, and because Wilson did in fact attack the CI's character after the bolstering, the Court agreed that the error was harmless and upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Taylor v. Com., 2017 WL 4310489 (Ky. 2017)

FACTS: *This case revolves around alleged procedural errors in trial, so the facts of the underlying trafficking conviction is not critical to the summary.*

[33] 171 S.W.3d 14, 23 (Ky. 2005),

During his trial, a part of Taylor's defense involved impeaching the credibility of the CI. He began making discovery motions on exculpatory evidence early in 2015. Taylor learned in November of that year that the CI had been criminally charged in another matter, in September. He also learned the case was dismissed against the CI, which he argued occurred was due to the Commonwealth's intervention. Despite his request on information about that case, he received nothing, and moved to dismiss his own indictment. The Commonwealth produced 192 pages of discovery during the Christmas holiday week and Taylor's own trial was scheduled for January 5.

Upon motion, the Court refused to dismiss the indictment, offering a delay or exclusion of some of the prosecution evidence. Taylor rejected those options. The Court denied his motion and he was ultimately convicted. He then appealed.

ISSUE: May a dilatory production of discovery invoke RCr 7.24?

HOLDING: Yes

DISCUSSION: The Court agreed that first, there was no Brady[34] violation. The discovery was produced, albeit, according to Taylor, untimely. Taylor argued that the dilatory production violated RCr 7.24, to which a timeliness obligation was added by Roberts v. Com.[35] The Court agreed, however, that any remedies for failure to produce would fall to the discretion of the trial judge, and while dismissal was an option, it was not required. The Court agreed that the trial court's decision was proper.

The Court also addressed Taylor's argument that the CI was improperly bolstered by the detective. As part of a response to a question, the detective stated that he felt the CI was trustworthy and credible. The Court agreed that it was improper to bolster before the credibility of an individual was questioned, but that the error, if any, of such character evidence, was harmless. Further, since he subsequently DID attack the CI's credibility, the issue was doubly harmless.

The Court upheld his convictions

TRIAL PROCEDURE / EVIDENCE – CONSTRUCTIVE POSSESSION

Burko v. Com., 2017 WL 3951896 (Ky. App. 2017)

FACTS: Whitley County officers responded to a 911 call of a possibly intoxicated driver driving erratically on I-75. They found a pickup matching the description and approached. Burko, the driver, reached for and entered the glovebox, and the officers could see a firearm inside. He identified that the weapon was "legal," as he was a security officer. The weapon was found to be loaded.

[34] Brady v. Maryland, 373 U.S. 83 (1963).
[35] 896 S.W.2d 4 (1995).

Upon further investigation, Burko was determined to be a felon, and was charged with possession of the firearm. Also in the truck were duffel bags with handcuffs, his medication and ammunition. Burko later argued that the truck and the gun did not belong to him, but to his wife, who asked him to drive it home. (At the time, they were not married.) His wife claimed she had given the gun to another person, who then borrowed the truck, and left the weapon in the glovebox. That individual testified that they had done so, but that he had not left a loaded magazine in that gun, but had removed it before place it there.

Burko was convicted and appealed.

ISSUE: Is the driver of a vehicle generally responsible for all weapons found in the vehicle?

HOLDING: Yes

DISCUSSION; Burko claimed there was "little to no evidence" that put the gun in his possession. In fact, prior case law had affirmed cases of constructive possession when a person lived in a household with guns. At the time, he controlled the vehicle and in fact, he made statements that indicated he was aware of the gun and had the ability to control it. Further, a witness testified that he'd placed the unloaded weapon in the vehicle only hours before the stop, so someone had to have loaded it. Only Burko was in possession of the truck during that time frame.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – ADMISSION OF TEXT MESSAGES

Isaacs v. Com., 2017 WL 3971619 (Ky. App. 2017)

FACTS: During the summer of 2014, Isaacs's granddaughter (age 12) was staying with her grandparents. Her mother reported that the granddaughter had sex with a neighborhood boy during that time – and upon further discussion, Isaacs believed the child had been raped. His daughter (the girl's mother) also stated that "he would never see his granddaughter again because it had happened while she was under his care." She also told him about "explicit text messages" that the pair had exchanged.

Isaacs took his handgun and went in search of the boy, who was thought to be 16-17 but was in fact 14, to get answers. At some point he shot the boy several times. He was eventually arrested after a five hour standoff in Franklin County.

At trial, he intended to admit the text messages, but the prosecution objected. That was denied. At trial he raised the issue of extreme emotional disturbance (EED) in defense of his actions. He was convicted, however, of Assault 1st. He then appealed.

ISSUE: May evidence be excluded even if it may bear upon a legal defense?

HOLDING: Yes

DISCUSSION: Among other issues, Isaacs argued that the trial court denied him the right to present a defense. However, he in fact, had never seen the text messages, and only learned of the exact content (other than the "gist") days after the shooting. However, the record indicated that he was aware of their existence. The trial court found they had little probative value, however, and excluded them "absent a showing of relevance prior to eliciting testimony from any particularly witness regarding the texts."

The court noted that the "EED mitigator" applies only to assault, and is a "reasonable explanation or excuse" to be judged from the viewpoint of the defendant, to the assault. Although his subjective belief that it was rape might be relevant, but the texts, in fact, simply confirmed they'd had sex, which was undisputed.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – NEWLY DISCOVERED EVIDENCE

Com. v. Clark / Hardin, 528 S.W.3d 342 (Ky. 2017)

FACTS: On April 1, 1992, Rhonda Warford was leaving a Kroger grocery store near her home, when she was harassed by a strange man who said "he wanted to marry her." Just after midnight, she left home and never returned. Three days later, her body was found 50 miles away, in Meade County. She died from multiple stab wounds. Hair and fingernail scrapings were collected from her hands, which were bagged at the scene.

At the time, she had been dating Hardin, and Hardin was friends with Clark, who had "socialized" with the victim's sister at one time. The victim's mother told police at the time that she believed all four were "involved in Satanism."

Ultimately, Hardin and Clark were convicted of murder. In 2009, their case was taken up by the Innocence Project, which requested testing of the hairs and scrapings, which the trial court denied. Hardin and Clark appealed and after several proceedings, their convictions were vacated. The Commonwealth appealed.

ISSUE: May DNA evidence from a long time ago be retested and be the subject of a "newly discovered evidence" motion?

HOLDING: Yes

DISCUSSION: Hardin and Clark based their case on "newly discovered evidence" – the hair, scrapings and a blood-stained rag found at the scene. Such testing was not done at the time (given the state of the science), but modern DNA testing excluded the men as the source of the hair. It also indicated that Hardin was the source of the blood found on the rag, rather than the victim, as he'd claimed at trial. The Court noted that the forensic expert at the trial indicated a "match" with the hair, to Hardin, and that was pushed by the prosecution throughout the case. In later cases, the courts had noted that testimony about a match "implies a level of certainty that exceeds the limits of science."

The Court also addressed testimony by a Louisville Metro detective who claimed that Hardin had confessed that he had begun "to want to do human sacrifices." Much later, it was learned that the same detective had testified falsely in an unrelated murder case, and the defendant in that case was later exonerated. In another investigation, he'd lied under oath about erasing a recording.

The Court upheld the vacating of the convictions and remanded the case, despite the Commonwealth's argument that retrying the case would be essentially impossible.

TRIAL PROCEDURE / EVIDENCE – MISSING EVIDENCE

Hensley v. Com., 2013 WL 5048758 (Ky. 2017)

FACTS: On October 19, 2000, Young found a body, with multiple stab wounds, in a ditch. She saw Hensley, bloody, trying to get a vehicle out of a nearby ditch. Since the body was within feet of Robbins' porch, she went there, and he identified the victim as Haywood. Hensley, tracked to his mother's home where he'd showered, claimed that he'd been talking to Haywood when someone ran up, pushed him and stabbed Haywood. Hensley was indicted for the murder.

At trial evidence was presented as to hair and blood. Hensley was convicted and appealed. As there were errors in the trial, the case was remanded to allow for a search for evidence that was of record but had disappeared. The trial court ordered a search but only one item turned up. Hensley also argued he had an affidavit that indicated that a witness had heard Robbins tells another party that he'd committed the murder. At a hearing, that witness testified that he'd heard Robbins tell a third party that he'd committed the crime, and that'd he'd told a KSP detective about it. (It was possible the detective was retired when he was told.) The trial court denied the motion to overturn and Hensley appealed.

ISSUE: Is evidence found to be missing necessarily in "bad faith" if a long time has passed?

HOLDING: No

DISCUSSION: The Court noted that the evidence did not support Robbins' alleged confession. The knife, for example, was found in Haywood's car, which was different than Hensley had testified at the time.

The Court agreed that the missing evidence had not been made available to Hensley before it disappeared, and as such, might have some potential exculpatory value, but there was no evidence there was any bad faith. There was no evidence it was destroyed, but it was simply missing. The court noted that the request to search of such evidence, in 2015, was 12 years after Hensley was sentenced, and the failure to locate the evidence was not bad faith.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Sills v. Com., 2017 WL 3631962 (Ky. 2017)

FACTS: Sill and Roach were involved in an intermittent relationship. Sills abused Roach and threated to kill her multiple times. She left the state in August, 2013, and returned two months later to deal with property issues. On October 11, 2013, Sills called to his neighbor, Gardner, telling her that he'd "done shot Lisa." Gardner testified later that he claimed that Roach had bitten him. He told her he'd shot Roach with a rifle, and left messages for his employer to that effect as well.

Sills was charged with murder. The Commonwealth was permitted to introduce evidence of the violence in their relationship. He was convicted and appealed.

ISSUE: Is evidence of a prior assault relevant in a homicide case involving the same victim?

HOLDING: Yes

DISCUSSION: Sills argued that the evidence was not relevant. The evidence indicated they had a four year relationship and the abusive behavior was constant during most of it. He argued that he acted in self-defense, but that evidence was also before the jury. The Court agreed that the evidence of domestic abuse and threats, given the close proximity in time, was properly admitted.

TRIAL PROCEDURE / EVIDENCE – PHOTOS

Calhoun v. Com., 2017 WL 3447103 (Ky. App. 2017)

FACTS: At about 5 p.m., on February 18, 2015, Yates was involved in a collision with Calhoun. At the time, the roads were in poor condition due to winter weather. Calhoun had been drinking prior to the crash. A witness testified that Calhoun's speech was slurred and there were beer cans all over. A responding paramedic testified that Calhoun was "conscious, disruptive and smelled of alcohol." Blood drawn after the wreck was at .213.

Trooper Hensley (KSP) was the primary investigator. He was unable to take many photos that day, due to the weather. Photos taken four days later depicted a road with better lighting and cleared of snow and ice, as well as debris. He did indicate that marks in the road corresponded with marks he'd seen the night of the crash. In an interview, Calhoun had blamed the crash on poor visibility, but had also admitted he "drank a few."

Calhoun was convicted of Manslaughter and DUI. He appealed.

ISSUE: May photos taken several days after an incident still be admissible?

HOLDING: Yes

DISCUSSION: With respect to the crash, the Court looked to Mitchell v. Com.[36] In that case the Court agreed some photos may be misleading, although admissible, because it portrays a scene that is "materially different." However, unlike Mitchell, there was no staging, and there were photos that did depict the scene that night. Trooper Hensley adequately authenticated both sets of photos and a jury should have not been confused by them.

The Court affirmed his conviction.

CIVIL LITIGATION

Lickteig v. Schwab, 2017 WL 3129197 (Ky. App. 2017)

FACTS: On August 23, 2010, Roth, a Louisville Metro Police civilian employee, telephoned both 911 and Sgt. Schwab's cell phone to report a man masturbating in his vehicle. She provided information on the vehicle and the individual. Roth was shown a photo array and identified Lickteig. Schwab did a brief investigation, attempting to view video that may have captured the scene, but was unsuccessful. He tried to contact and take a statement from Lickteig, who refused to talk without an attorney.

Schwab prepared a criminal complaint and Lickteig was subsequently charged with Indecent Exposure, 2nd degree. At trial, Lickteig testified that the situation had started with a road rage incident that was instigated by Roth, who ultimately forced him off the road. A witness testified that Roth had told her that Lickteig had exposed himself to her in a park (rather than in his vehicle) and that she was "going to get him."

The Court acquitted Lickteig, finding that even he had been masturbating, there was no evidence that he intended to draw attention to it, and that any visual contact was incidental.

[36] 423 S.W.3d 152 (Ky. 2014).

Lickteig filed suit for malicious prosecution against Schwab. He was granted summary judgement, with the court finding no genuine issue of material fact. Lickteig appealed and the appellate court reversed, finding the need for more discovery

ISSUE: May a malicious prosecution action be defeated if there is probable cause to support the arrest?

HOLDING: Yes

DISCUSSION: The Court noted that Kentucky law disfavors the tort of malicious prosecution, particularly when connected with a criminal prosecution. The Court agreed that the information provided, from a credible witness, was sufficient to find probable cause.

Being unable to prove the absence of probable cause, Lickteig's claim failed.

EMPLOYMENT

University of Kentucky v. Carpenter, Chilton and Marco, 2017 WL 3634481 (Ky. 2017)

FACTS: Seven female members of the UK PD filed a joint complaint against the University and others related to gender discrimination and the Kentucky Whistleblower Act. Their cases were severed for individual consideration. All of the cases were ultimately dismissed (in various ways) and the cases of Carpenter, Chilton and Marco were remanded for a possible joint trial. The University defendants appealed.

ISSUE: May a discrimination lawsuit fail because of evidence that there was a reason for a difference in treatment?

HOLDING: Yes

DISCUSSION: The Court looked at each of the claims. In Marco's case, she claimed she was monitored more than others and that she failed to get backup from fellow officers, but could not provide specifics. In other claims, the Court found no indication of gender related bias or decisionmaking. Chilton argued that she was given an unusual shift change, and attributed it to her gender and pregnancy. The Court noted that UKPD provide a legitimate alternative reason for the shift change, and that it was not pretextual. On a claim of retaliation, the court agreed, the parties that allegedly did commit retaliation were not aware of the underlying issue upon which she claimed she had suffered retaliation. In the matter involving Carpenter, the Court agreed that testimony was properly restricted from other female employees, when their claims involved different decisionmakers.

The Court reversed the Court of appeals and reinstated the trial court dispositions.

MISCELLANEOUS

Kentucky Concealed Carry Coalition, Inc. v. City of Hillview, 2017 WL 3833253 (**Ky. App. 2017**

FACTS: In 1996, Hillview enacted an ordinance that prohibited the carrying of concealed deadly weapons in city owned buildings, as well as in vehicles, watercraft and aircraft. In 2013, following the passage of an amended version of KRS 65.870, which prohibited cities from enacting such ordinances, the Kentucky Concealed Carry Coalition filed suit. The Circuit Court agreed that the ordinance violated the statute, but refused to order the city to change the ordinance or pay attorneys' fees. The Coalition appealed.

ISSUE: May a court force a legislative body to repeal or change a law?

HOLDING: No

DISCUSSION: The Court noted that it did enjoin the city from enforcing the ordinance, but could not order it to repeal or change the actual ordinance. The Coalition noted that by remaining on the books, anyone researching the law might not understand that the law was not to be enforced.

The Court agreed that when the city failed to amend the ordinance, it could be declared null and void, which was done. The Court affirmed that part of the decision.

With respect to attorneys' fees, however, the court agreed that the statute mandated the award of attorneys' fees to a prevailing party. There was no dispute but that the Coalition was the prevailing party in the case. However, since the trial court "perfunctorily" dismissed the requested fees as excessive and unreasonable, the court noted it could not refuse to award fees. The court remanded the case for a determination of appropriate fees.

Knox v. Com., 2017 WL 3834868 (Ky. App. 2017)

FACTS: In 2012 Knox was charged with felony assault. He received a pretrial diversion for three years. In 2013, he was involved in a vehicle crash. A responding officer founded three shotguns in Knox's vehicle. His license was also suspended and his record indicated he had a conviction for Assault 2nd. He was arrested for being a felon in possession. (He was also found to have disposed of Xanax in a gas station restroom following the crash.)

Knox was convicted and appealed.

ISSUE: Does felony diversion make someone a convicted felon, for the duration of the diversion time?

HOLDING: Yes

DISCUSSION: Knox argued that his plea and pretrial diversion did not constitute a felony conviction. Looking to Derringer v. Com.,[37] the Court agreed that it could not be used for a PFO determination, but could be used as the basis for a conviction for other offenses.[38] Specifically, the prior court had indicated that Knox would be considered a convicted felon until he successfully completed the period of diversion. As such, the Court upheld his conviction.

The Court also upheld the conviction for the drugs, as the court agreed that a jury could reasonably find that no one else was in the restroom during the relevant time frame.

SIXTH CIRCUIT

FEDERAL LAW

POSSESSION OF A FIREARM BY A CONVICTED FELON

U.S. v. Pratt, 2017 WL 3169239 (6th Cir. 2017)

FACTS: In April, 2015, KSP received a tip about a high degree of traffic at a Hindman home. Troopers set up surveillance and observed several suspected drug transactions. They obtained a search warrant. Pratt answered the door; Dyer, his girlfriend, was also present. During the search, troopers discovered an open gun safe including six long guns, a shotgun was learning against the outside of it, and a handgun was located in a small locked safe.

Pratt had a different address on his ID, but admitted he'd lived there for a number of years. He claimed the long guns but stated the pistol belonged to another man. Pratt, a convicted felon, was charged with the possession of all 8 weapons. He was convicted and appealed.

ISSUE: Is constructive possession of firearms sufficient for conviction?

HOLDING: Yes

DISCUSSION: Pratt argued that evidence of the drug trafficking should have been excluded from his trial on the firearm. The Court agreed that such background evidence can be admitted "when the evidence includes conduct that is inextricably intertwined with the charged offense." [39] It is part of the Res Gestae – and may include "evidence that is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of the witness's testimony, or completes the story of the charged offense."

The Court agreed that the drug trafficking case both explained the presence of KSP at the house, as also explained how Pratt obtained the firearms. The pistol, for example, was showed to be a

[37] 386 S.W.3d 123 (Ky. 2012).
[38] Thomas v. Com., 95 S.W.3d 828 (Ky. 2003).
[39] U.S. v. Church, 800 F.3d 768 (6th Cir. 2015).

"pawn" in effect in exchange for drugs. Another witness traded 4 of the rifles for drugs, and the shotgun, Pratt admitted, was "for protection."

With respect to the actual crime, the court agreed that Pratt both actually and constructively possessed the weapons, with at least one witness placing several of the rifles in his hands and showed a juvenile how to handle it. That is more than simply touching it but indicates a high degree of control. And even absent actual, constructive possession is prove and was more than adequately supported, given, among other things, they were mostly kept in an unlocked safe. There was also evidence that he lived there, including clothing and prescriptions, the latter of which listed that as his address.

The court upheld his conviction.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Perry, 864 F.3d 412 (6th Cir. 2017)

FACTS: At a probable cause hearing, Lt. Drewery (Fayette County, TN, Sheriff's Office) swore in an affidavit to a number of facts, including tips and complaints about Perry and his girlfriend dealing in drugs, and he observed heavy vehicle and foot traffic and visitors who stayed on a minute or so. He observed Perry exchange money and packages in the parking lot with several subjects. He received a search warrant and executed it four days later. He specifically did not state when he observed specific transactions, only that they were between October 15 and December 3, 2014.

Perry was charged. He requested suppression of the search warrant and the evidence, arguing it was stale. The trial court denied the motion and he took a conditional guilty plea.

He then appealed.

ISSUE: Does time necessarily make a search warrant stale?

HOLDING: No

DISCUSSION: The Court agreed that a time lapse did not necessarily make the information stale. In U.S. v. Spikes, the Court had recognized "a general principle that when 'the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant."[40]

[40] 158 F.3d 913 (6th Cir. 1998).

Although the Court agreed it would have been preferable for the officer to have been more specific, it did not make the search warrant information stale.

The Court upheld the plea.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Johnson, 2017 WL 3263744 (6th Cir. 2017)

FACTS: After three failures at his attempts to rob a bank, Johnson decided to try again. (His prior conspirators had given up on him, and in his attempts to recruit more help, one of the men, instead, tipped off the FBI.) The FBI got a warrant to track Johnson's cell phone and he was found to be in Kalamazoo, Michigan. Local law enforcement found two men in an SUV behind a bank, and a state trooper followed behind. The cell phone was pinged and matched the movement of the suspect vehicle. "The trooper and his commanding officer decided to wait to see if the vehicle committed any traffic violations before pulling it over. After a number of minutes, the trooper observed the SUV following another vehicle too closely, and crossing over the road's fog line. The trooper then initiated a traffic stop."

Johnson, Shelton, Walker and Green were inside the vehicle. Johnson had an outstanding warrant and was arrested. A drug dog alerted on the vehicle and a firearm was found. Two of the occupants agreed they'd been recruited to rob a bank but they "got cold feet at the last minute" and were headed back to Chicago when stopped. Johnson was interrogated and made several incriminating admissions.

Johnson was charged with various federal crimes. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: May a stop be made under the collective knowledge doctrine?

HOLDING: Yes

DISCUSSION: First, Johnson argued that the stop was not supported by reasonable suspicion. The Court agreed that "Under the 'collective knowledge doctrine,' we take into account all of the information available to the law enforcement personnel investigating Defendant in determining the legality of the stop, without myopically focusing on the information available to the trooper that initiated the stop."[41]

> At the time the traffic stop was initiated on February 27, 2015, the FBI and the Kalamazoo County Sheriff's Department knew: (i) from Laron Swift that Defendant was recruiting men to help rob a bank in the Kalamazoo area in early 2015; and (ii) from cell phone tracking data that Defendant was near the Kalamazoo branch of Comerica Bank, which

[41] Arvizu, 534 U.S. at 273; U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012) (collecting cases).

had recently been robbed; (iii) that an SUV containing several men had been spotted loitering outside of Comerica Bank; and (iv) that when that SUV moved, Defendant's cell phone data showed that he was moving on the same roads and in the same direction as the SUV. This was more than sufficient information for law enforcement to develop a reasonable suspicion that Defendant was in the SUV, and that he had recently been involved in a plot to rob the Kalamazoo branch of Comerica Bank. We therefore hold that the traffic stop was justified by a reasonable suspicion that wrongdoing was afoot.

With respect to the interrogation, the Court agreed that when the interview started, Johnson invoked his right to counsel. However, he immediately "went on to express concern as to why he was being questioned by the FBI." They explained that they could not interrogate him but "offered to explain why they had come to talk with him." He signed a rights form and then reiterated they would stop if he wanted to speak to an attorney." The Court agreed that Johnson "knowingly and voluntarily re-initiated his interview with Agent Johnson and Detective Sperrel after the officers ceased questioning following Defendant's request for counsel. Accordingly, under settled legal principles, the police did not violate Defendant's Fifth Amendment rights by continuing to question him.[42]"

The Court upheld his conviction.

SEARCH & SEIZURE – COMMUNITY CARETAKING

U.S. v. Lewis, 869 F.3d 460 (6th Cir. 2017)

FACTS: In August, 2014, Officer Turner (London, Ky. PD) responded to a call of an intoxicated woman at Wal-mart. He found the woman, Lakes, inside and she was clearly impaired. She indicated she had taken pain medication for her back. She stated she was there with you boyfriend, Lewis, who was outside in his truck. They, along with Officer Cloyd, went out to see if her boyfriend could, in fact, drive her home. They found the truck but with the tinted windows, they could not immediately tell if anyone was inside. Peering inside, Officer Turner could see that Lewis was asleep on the passenger side. Someone, and there was dispute as to whom, opened the front passenger-side door, which caused the dome light to startle Lewis awake. The officers could see that he had a clear plastic baggie on his lap and he immediately tossed it over onto the back floorboard.

Officer Turner shined his light on the baggie and could see something blue, possibly pills. He confirmed it was pills by looking more closely. Lewis denied anything about the pills. He was also impaired. Both were arrested and the pills were found to be 493 Oxycodone and 5 Xanax. A few more Xanax were found on Lewis as well.

[42] *See,e.g.*, Edwards, 451 U.S. at 484–85; Henness v. Bagley, 644 F.3d 308, 320 (6th Cir. 2011) ("An Edwards reinitiation occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk about his case."); Davie v. Mitchell, 547 F.3d 297 (6th Cir. 2008) (same); U.S. v. Whaley, 13 F.3d 963 (6th Cir. 1994) (same).

Lewis was charged with federal drug offenses. He moved to suppress, arguing the search was illegal. The trial court agreed that until Officer Turner spotted the baggie, the officers were simply trying to ensure Lakes had a safe ride home. As such, their actions fell under the "community caretaker" exception.[43] However, once they spotted the bag, it became a search under the automobile exception.[44]

Lewis took a conditional guilty plea and appealed.

ISSUE: May officers open a car door to check on a subject in a community caretaking situation?

HOLDING: Yes

DISCUSSION: The Court agreed that the actions fit under the community-caretaker exception. There was nothing that suggested they were attempting any traditional law enforcement functions.[45] Any limited intrusion on Lewis's privacy from opening the door was negligible, as he was in his car, not his home. The officers simply opened the door. Although perhaps they should have knocked before doing so, that did not make their actions unreasonable.

The Court affirmed the plea.

INTERROGATION

Schreane v. Ebbert (Warden), 864 F.3d 446 (**6th Cir. 2017)**

FACTS: Schreane participated in the murder of Edwards, in Chattanooga, in 1991. The case went cold for some time. In 1999, acting on a tip, police picked up Schreane, who confessed. Schreane had, in fact, reached out, through his girlfriend, to the police, as he was in custody on an unrelated matter. Nothing was promised to him, although the investigator indicated he would tell the prosecutor that Schreane had come forward on his own and that some benefit might accrue due to that. Det. Mathis, the lead investigator, stated he'd talked to Schreane for some time and apparently, an attorney was mentioned, before he gave him Miranda, because he was initially under the belief that Schreane simply had information. He was charged, and argued that his statement was taken in violation of his Fifth Amendment rights.

Schreane was convicted and appealed. Following the unsuccessful state appeals, Schreane took a habeas corpus petition alleging Fifth Amendment violations. The trial court denied the motion and he further appealed.

ISSUE: Is an incarcerated person "in custody" for Miranda purposes?

[43] U.S. v. Rohrig, 98 F.3d 1506 (6th Cir. 1996).
[44] *Smith v. Thornburg*, 136 F.3de 1070 (6th Cir. 1998).
[45] U.S. v. Brown, 447 F. App'x 706 (6th Cir. 2012); Cady v. Dombroski, 413 U.S. 433 (1973).

HOLDING: Not necessarily

DISCUSSION: Schreane argued that once he requested counsel, all interrogation should have ended. The Court noted that since he was not in custody at the time he mentioned an attorney, his Miranda rights had not as yet attached. The Court looked to four factors outlined in Howes v. Fields: (1) the location of the questioning; (2) the duration of the questioning; (3) statements made during the questioning; (4) the presence of physical restraints; and (5) the release of the inmate after the questioning.[46] Although he was in actual custody, as he was incarcerated for an unrelated offense, he was not even initially a suspect. He was not restrained and in fact, wasn't even indicted for the murder for several more years. The only factor in his favor was the duration, as the interview lasted more than four hours, but that was not determinative.

The Court upheld his state court conviction.

Weissert v. Palmer (Warden), 699 Fed.Appx. 534 (6th Cir. 2017)

FACTS: Weissert organized a plan, with Lewis and Durst, to rob Sibson, Weissert's drug dealer. Sibson was murdered during the robbery. Following the crime, Lewis implicated Weissert, who was arrested and interrogated twice. During the first, he stated he'd like an attorney, and the interrogation ended. He went voluntarily to the interrogation the second time and while he "referenced an attorney multiple times," he continued to volunteer information and answer questions. Ultimately, the detectives explained how he could get in touch with an attorney and that interrogation also ended.

He moved for suppression of his statements in the second interrogation. The Court held that his invocation was not unequivocal and his statements were admissible.

At the preliminary examination, Lewis testified in detail and was cross-examined at length. At trial, however, Lewis invoked his Fifth Amendment rights against self-incrimination and refused to testify. The Court considered him legally unavailable and allowed his preliminary examination testimony to be provided instead.

Weissert was convicted and appealed.

ISSUE: If a suspect continues to talk of their own volition, after invoking their right to an attorney, may their statements be admitted?

HOLDING: Yes

DISCUSSION: With respect to his invocation, the court agreed that Weissert did mention an attorney, but also "expressed his willingness to speak with the officers and his desire for them to

[46] 565 U.S. 499 (2012).

believe him." The Court agreed that he did not invoke his Fifth Amendment right and that his statements were admissible.

The Court looked at the admission of Lewis's prior testimony under Crawford v. Washington.[47] The Court agreed that his examination was testimonial and he was, it was stipulated, unavailable at trial. The Court agreed that there had been a fully adequate opportunity to explore his testimony by defense counsel, and as such, the testimony was properly admitted.

U.S. v. Saylor, 2017 WL 3411878 (6th Cir. 2017)

FACTS: In August, 2013, the FBI received a tip that a particular email user (Saylor) had sent child pornography to another user. Saylor had previously been convicted to two similar sex offenses. They confirmed his identity. In March, 2014, they received another tip that returned to an email address connected to a cell phone possessed by Saylor. They obtained a search warrant for his residence, a halfway house for sex offenders in Louisville. FBI and LMPD officers executed the warrant, and collected all of the residents (nearly a dozen) into a central room. Some were initially handcuffed, but most were informed soon that they could leave if they chose.

Saylor was spotted and singled out, and was directed into the kitchen to speak to law enforcement. He was monitored there until FBI interviewers arrived, he was not told he could leave. Two interviewers sat down with him and started with general questions, but focused in on his involvement in the trade of child pornography. He made a number of incriminating statements and ended with threatening to stab himself with the pen they had given him to write his confession. He was not placed under arrest by the FBI, but his probation officer, who was present throughout, did arrest him immediately afterward.

The FBI executed warrants on email addresses he'd claimed. He was charged with several federal crimes involving child pornography. He moved to suppress, arguing he had been in custody and improperly questioned without Miranda. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is a resident of a halfway house, under probation, free to leave that location for determination of a custodial interrogation?

HOLDING: Yes

DISCUSSION: The Court noted that the location of the interview presented the closest question. While he was interviewed in his home, that home was a halfway house under the Kentucky Dept. of Corrections, and he was subject to its policies and procedures. However, as a probationer, he was given more freedom of movement than many of the residents. However, he was subject to a warrantless search if his probation officer had reasonable suspicion that he possessed contraband. However, he was generally free to leave as he desired. The Court agreed that the

[47] 541 U.S. 36 (2004).

location was not so inherently intimidating so has to make it custodial. Although there were a large number of officers present, there was also a large number of residents to be controlled, and the interview took place in a kitchen with an open door and no obviously armed guard. He had agreed, and did, wait patiently for them to arrive to interview him for some minutes.

The Court applied the factors to determine custody as indicated in the cases of U.S. v. Brobst[48] and U.S. v. Craighead.[49] The Craighead factors include the number of armed officers, whether the subject was restrained, whether the subject was isolated and whether he was informed he could leave. For Brobst, the factors to determine custody include the language used to summon the subject, the extent to which they are confronted with evidence of guilty, the physical surrounds, the duration and the degree of pressure. In balancing both sets of factors, some which favored the Government and some which favored Saylor, the Court agreed that Saylor was not in custody during the interview.

Saylor's conviction was affirmed.

U.S. v. Miller, 696 Fed.Appx. 696 (6th Cir. 2017)

FACTS: Miller was a registered sex offender, although non-compliant as he was listing an Ohio address he did not occupy. During the time frame, he came under investigation for online activity in which he'd been chatting with someone he believed to be a 14 year old girl. In fact, he was communicating with two investigators. On May 31, 2014, however, he ended the communications. When the "teen" send him a message that in effect threatened Miller, he responded a few hours later although there was confusion as to the timing of the messages.

They continued to exchange text messages for several days, until Miller was arrested on June 3. He was interviewed that same day, having been given Miranda warnings.

At 9:52 a.m., he indicated he was not going to answer any more questions. When told he was stonewalling, he asked for a bathroom break, at which point he'd consider answering more questions. At 9:58, following the break, he returned and answered a few questions. At 10:04 he said he couldn't talk anymore. He repeated that he did not want to continue until about 10:17.

Miller was charged with various federal child sex offenses. He argued he'd invoked his right to remain silent at 9:52, but the court ruled he did so at 10:04, and suppressed all statements after that time.

Miller was convicted and appealed.

ISSUE: Must questioning cease when a subject invokes their right to silence?

[48] 558 F.3d 982 (9th Cir. 2009).
[49] 539 F.3d 1073 (9th Cir. 2008).

HOLDING: Yes

DISCUSSION: Miller argued that he'd cut off all communications, but when the "minor" threatened suicide, they "preyed" on his emotions and caused him to resume communications. The Court agreed that "faking a suicide threat to induce someone to resume communications during a sting operation is a concerning tactic for police officers to employ." However, the Sixth Circuit had not "adopted the outrageous government conduct defense."

The Court agreed, however, that he invoked his right to silence at 10:04, not 9:52, and that all statements past that time were suppressed. He did not at any time clearly invoke his right to counsel.

42 U.S.C. §1983

42 U.S.C. §1983 – MALICIOUS PROSECUTION

Miller v. Maddox, 866 F.3d 386 (6th Cir. 2017)

FACTS: Miller was arrested, charged and indicted on charges of reckless driving and resisting arrest. She filed suit against the arresting officer, Maddox, for malicious prosecution, alleging that the prosecution was based on false testimony. The trial court initially ruled in Maddox's favor, and Miller appealed.

ISSUE: If false testimony sets a prosecution into motion, may a malicious prosecution claim be made?

HOLDING: Yes

DISCUSSION: The Court looked at the elements of such claims. Since it was agreed that a criminal prosecution was initiated against her, what was in question was whether Maddox "made, influenced, or participated in the prosecution decision." Maddox swore to an affidavit as to Miller's alleged offenses, and also testified in a preliminary hearing. Maddox was the only witness and as such, he certainly did influence and/or participate in the decision to prosecute.

The next element was whether there was probable cause to support the charges. Although in the past, an indictment was considered to conclusively establish probable cause, the case of King v. Harwood now creates an exception to that rule.[50] That exception provides:

> … where (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the

[50] 852 F.3d 568 (6th Cir. 2017).

ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony . the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive.

The Court agreed the statements were made to set the prosecution into motion. Without his false testimony, the case would not have moved forward. As such, the Court agreed that Miller is "entitled to rebut the presumption of probable cause." Further, with no evidence that she physically resisted his efforts to remove her from her vehicle, there was nothing to support resisting arrest. The officer admitted Miller was not speeding and although he insisted she ran a stop sign, his dash-cam video refutes that as well. Miller was detained for a short time and required to post a fee and participate in a pretrial process and the Court agreed that was a 'deprivation of liberty."

Finally, the Court looked at Maddox's possibly absolutely immunity for his false statements. The Court quickly concluded that since the false statements occurred in the context of a warrant affidavit, not a grand jury presentation, he was entitled to only qualified immunity.

Since Miller had a clearly established right to be free from arrest on fabricated evidence, the Court agreed that Maddox was not entitled to qualified immunity. The Court reversed the finding in the officer's favor and remanded the case.

42 U.S.C. §1983 – SEARCH & SEIZURE

Gunnels v. Kenny / Worthing / Hatchett / Eckles / Pletsher, 700 Fed.Appx. 478 (6th Cir. 2017)

FACTS: In 2013, Gunnels purchased an old hardware store with living quarters. He began the process of preparing to renovate the property early the next year. An inspector (Worthing) dropped by and they discussed the work he was doing, he denied he was doing anything that required a permit. With further interactions, he continued to deny doing anything that required an inspection or a permit. On February 12, 2014, Worthing again came by and asked if he could do a walk-through, Gunnels refused. Worthing insisted he could enter any building under construction. Gunnels challenged that assertion.

Worthing left, but returned with an officer, Eckles. Gunnels continued to deny them entry and Worthing left, but Eckles stayed for approximately five hours, sitting in his car. During that time, Gunnels and friends were laying carpet, and even offered Eckles a slice of pizza. Eventually Chief Kenny arrived, with Worthing and they sat together in Kenny's car. Kenny told Gunnels they were getting a search warrant for the building. Within a few minutes, the warrant arrived and they proceeded to search. They found the doors between the hardware store and the residential space, in the rear, screwed shut, and Gunnels later stated he did so when he realized they were going to search the front portion. He did, however, allow them into the space and they found a number of current violations. They issued a stop work order.

Gunnels was later told that he would need to get a permit and approval from a structural engineer to start work and occupy the property. Instead, he filed suit, arguing the search was unlawful. The defendants requested summary judgement and were given it. Gunnels appealed.

ISSUE: Does a minor false statement in a warrant affidavit invalidate the warrant?

HOLDING: No

DISCUSSION: Gunnels argued that the search warrant was based an affidavit containing a false statement, specifically, that he had an ownership interested in a medical marijuana dispensary. He argued he did not, although he socialized there. As such, the Court agreed the statement, made by Pletscher, was not given falsely or recklessly. Further, it was not necessary to the determination of probable cause, which included "ample evidence" of violations of the building code and his obstruction of Worthing.

The Court affirmed the summary judgement.

Carter v. Hamaoui,699 Fed.Appx. 519 (6th Cir. 2017)

FACTS: On August 22, 2013, Carter and Thomson were hauling metal scrap from Lorain to Cleveland, OH. Carter set his cruise control. At about 1 p.m., Lt. Crates (Rocky River PD) received a tip from the DEA that a flatbed truck in that area would be carrying drugs with aluminum cans. That was sent to Officer Hamaoui (same agency) with instructions to "make your own PC" for the stop. The same tip was passed on to the Ohio State Highway Patrol. Officer Hamaoui arrived in the area and within a short time, spotted Carter's truck travelling well below the speed limit and weaving. He followed it and it continued to weave, and "its tires were bulging." (Dash cam video, which covered less than a mile, does not indicate weaving and indicated Hamaoui was going between 50-53 – in an area with a speed limit of 55.)

Officer Hamaoui made the stop, quickly joined by Trooper Baker with Paco, a drug dog. Officer Forkins arrived. The men were removed from the truck and Paco was taken around the truck, he alerted on the second pass. There was some argument that Paco was cued to make the alert. No evidence of marijuana or drugs as found. The truck was towed and Officer Hine (who does commercial truck enforcement) was asked to come to the garage to weigh it. The vehicle was approximately 6,000 pounds overweight and the rear axle was bulging. The officers broke apart the aluminum bales and went through them again, but no drugs were found. Carter was cited and told he could come back and get the aluminum (now scattered on the ground). Carter did not do so and the citation was dismissed.

Carter and Thomson filed suit under 42 U.S.C. §1983, against Hamaoui and Baker, and a conversion claim against Rocky River. The trial court found in favor of the officers and Carter and Thomason appealed.

ISSUE: Must an officer have sufficient knowledge to make a traffic stop on a specialized infraction?

HOLDING: Yes

DISCUSSION: The Court looked at the stop and noted that "the law requires at least reasonable suspicion of criminal activity or an *ongoing* misdemeanor in order to effect a traffic stop.[51] The Court agreed that the information the officer had was enough for reasonable suspicion that the truck was overweight, an ongoing misdemeanor. However, prior case law was focused on observations made by trained weight-enforcement officers, which Officer Hamaoui was not. The Court noted that "experience or training can matter in these cases" – to "form inferences and deductions that "might well elude an untrained person." At the time "Hamaoui also did not know the legal maximum weight of the vehicle or the elements of the law that he used to pull over Carter. The district court remarked that "it would be unreasonable to require an officer to know how much a vehicle is lawfully required to weigh before he could pull it over for suspicion of being overweight." The Court noted that evidence suggested that some types of tires bulge all the time, regardless of the load. Trucks also often drive slowly when travelling through speed trap areas. Many trucks carry large loads but are still not overweight. The Court found no reasonable suspicion for the stop.

The Court also noted that the dash did not indicate any traffic issues, although the officer claimed they occurred before he turned on the camera. Further, even the officers, in their "chat" – knew the tip alone wasn't enough for the stop.

Even acknowledging the reason for the stop was insufficient, the Court had to look at qualified immunity. The Court noted that:

> It has been clear since Terry v. Ohio that hunches, even in good faith, that the law is being broken, are not enough to provide reasonable suspicion of criminal activity sufficient to
> effect a stop.[52] And it has been further made clear that officers may not stop vehicles without reasonable suspicion of an ongoing traffic violation.[53] In the one—unpublished—opinion in the Sixth Circuit to address similar facts, we observed that where "deputies, experienced in weight enforcement, observed [a] truck impeding traffic and observed that it had a visible load, bulging tires, and sluggish movement," reasonable suspicion existed.[54] Of these five factors (experienced officers, impeded traffic, visible load, bulging tires, and sluggish movement), Hamaoui can point to two at best— bulging tires and a visible load[9]—and Hine's observation vitiates the reasonability of the suspicion based on the load. Given that Hamaoui could not demonstrate how the bulging tires could correspond to a particular violation, the case does not fall within Reid

[51] U.S. v. Arvizu, 534 U.S. 266 (2002); U.S. v. Simpson, 520 F.3d 531 (6th Cir. 2008).
[52] 392 U.S. 1, 21 (1968).
[53] U.S. v. Simpson, 520 F.3d 531 (6th Cir. 2008).
[54] Reid Machinery Inc. v. Lanzer, 421 F. App'x 497 (6th Cir. 2010).

> Machinery's safe harbor. The facts observed, without greater clarification demonstrating why they show a likelihood of violation of law, were not sufficient. Some "stronger indicator[] of [violative] conduct" in addition to what Hamaoui observed was required.[55] It is also clearly established that the anonymous tip was insufficient to demonstrate reasonable suspicion to pull Carter over.[56]

The Court also noted that his use of a drug dog indicated he was acting more "with a desire to seek out marijuana than to perform an overweight-vehicle inspection." However, the alert was enough to justify the search on the highway and to move it to the garage.

The Court concluded:

> It is not that every officer must have had experience or training in a particular crime, or be able to cite the code chapter and verse—far from it. But in the complex situation of commercial weight limits, which vary by vehicle, to say that any officer can look at a truck without knowing how much it should weigh or generally the limitations on its weight and still pull it over based on observations applicable to any commercial truck is to "invite intrusions upon constitutionally guaranteed rights."

The Court reversed the grant of qualified immunity for Hamaoui, but allowed it to stand for Baker.

42 U.S.C. §1983 – USE OF FORCE

Spencer v. McDonald / Taeff, 2017 WL 3499906 (6th Cir. 2017)

FACTS: During Spencer's lawsuit against McDonald and Taeff, Michigan State Troopers, alleging excessive force, the trial court refused to allow Spencer to cross-examine and impeach McDonald on a prior sexual assault allegation for which he'd been investigated. The jury returned a verdict in favor of the troopers and Spencer appealed that ruling.

ISSUE: May an officer give biographical information during testimony?

HOLDING: Yes

DISCUSSION: The trial court had refused to allow questioning on the investigation because the underlying allegation was not sufficiently similar to the accusation in his case. He argued that since Trooper McDonald offered evidence of his good character, he should have been allowed to refute that with the investigation. The Court, however, agreed that the information was more biographical than character evidence.

After resolving other issues, the Court affirmed the decision in favor of the officers.

[55] U.S. v. Townsend, 305 F.3d 537 (6th Cir. 2002).
[56] See, e.g., Srisavath v. City of Brentwood, 243 F. App'x 909, 915 (6th Cir. 2007).

CONFRONTATION CLAUSE

U.S. v. King,865 F.3d 848 (6th Cir. 2017) (Petition for Certiorari)

FACTS: In 2014, King, an attorney, approached Terry with an offer to help him launder drug money. In fact, Terry was a CI posing as a drug dealer and reported the offer to the police. Several meetings were set up with Terry sharing a number of details about his "operation" – none of which were true. The recordings of the meetings, played at trial, indicated King "proposing to imitate what he had seen on Breaking Bad to launder money." He suggested using his IOLTA account to perform fictitious legal services, to clean the drug money.

King was charged with money laundering and attempted money laundering. He was convicted and appealed.

ISSUE: May out of court recorded statements be used at trial?

HOLDING: Yes

DISCUSSION: The Court began:

> A sting operation blends fiction with non-fiction. The undercover officer feigns an offer to commit a crime and the individual accepts the offer, converting an offer to commit a crime based on untruths into a crime based on a true desire to violate the law. Sometimes, as it happens, the resulting crime blends non-fiction with fiction.

King claimed that the use of the recorded conversations violated the confrontation clause and that he had no opportunity to cross-examine Terry. To make such a claim, he had to show that the government "used an out-of-court statement for its truth."[57] In this case, the government introduced conversations to "prove what was 'represented,' not whether it was true." The question was whether it was an element of the money laundering offense, however.

The court looked to other case law, however, and noted that "sometimes as out-of-court statement will help establish an element of the offense; sometimes it will not."

The Court affirmed his conviction.

Stewart v. Trierweiler, 867 F.3d 633 (6th Cir. 2017)

FACTS: On December 19, 2011, Brown arrived to pick up Hamilton for a date. Her boyfriend, Stewart was there, and the two men battled. Ultimately Brown was shot and killed and Stewart fled. The evidence indicated that the pair intended to rob Brown. The evidence, including Hamilton's phone records, included 127 contacts with Stewart's number and 28 with

[57] Michigan v. Bryant, 562 U.S. 344 (2011).

Brown, and in the last minutes before the murder, she was in contact with both, with Stewart on call waiting. Both Stewart and Hamilton were charged with murder and related charges.

During the trial, Stewart argued that his Sixth Amendment Confrontation right was violated when certain statements made by Hamilton to the police were admitted. The state court had excluded some of the statements, and on appeal, agreed that others were improperly admitted. However, it concluded the errors were harmless because the admitted statements were "cumulative of properly admitted evidence."

Both were convicted and Stewart appealed.

ISSUE: Will improper statements doom a case?

HOLDING: No (if considered harmless.)

DISCUSSION: The Court agreed that the statements were, even if improper, still harmless, given the overwhelming evidence of Stewart's guilty. The Court affirmed the conviction.

David v. City of Bellevue, OH , 2017 WL 3635198 (6th Cir. 2017)

FACTS: On September 22, 2010, Bellevue PD received a 911 call of a dispute and man brandishing a firearm. Sgt. Matter and Patrolman Lawson were dispatched to the caller. Armstrong and several others were on his back porch, and Armstrong was known to the officers as the aggressor in prior incidents. Armstrong told the officers "with plenty of expletives," that a man had pulled at a firearm and pointed it at him. He identified a house and a man sitting on the porch. The officers went over to talk to him. Later evidence indicated that Armstrong and friends had earlier challenged the man about his actions.

The officers walked through several yards and crossed a street to reach the house. They had flashlights on, and weapons drawn. They wore dark uniforms and no hats. They approached from two sides and Lawson later testified he began to introduce himself, but the man, David, got up and walked into his home. Lawson called out and at that point, David pointed a firearm at Lawson. Lawson called gun and both officers fired – Lawson fired his entire magazine (16 rounds) and Matter fired 8 times. David was hit at least 15 times and never fired his weapon, he died at the scene. His wife emerged and was ordered inside. The officers were exonerated upon an investigation.

The Estate filed suit under 42 U.S.C. §1983. The District Court gave both officers qualified immunity and the Estate appealed.

ISSUE: Will multiple gunshots, after a subject is down, reduce the chance of a summary judgement in the officers' favor in a §1983 case?

HOLDING: Yes

DISCUSSION: The Court looked first at whether the officers gave warning and identification before the shooting. Neighbors stated they did not hear Lawson's claimed warning, and Matter didn't know precisely what Lawson said, but that wasn't enough to suggest that Lawson did not give the warning he claimed. The Court agreed, under Chappell v. City of Cleveland, that a warning was given.[58]

The Court then addressed whether David had his weapon pointed at the officers, posing a threat. Both officers claimed that David had his firearm pointed at Lawson. However, an expert witness testified that there were no bullet strikes to David's hands or arms, or the gun, consistent with him facing Lawson. The evidence suggested that he did not have his arm raised. Further, it was "of no import that Matter shot only after Lawson opened fire." "What counts is whether Matter knew that David did not pose a threat"

Although the Court agreed that shooting was lawful until a threat is ended, in this case, the facts indicated that most of the shots struck David when he was already down. The Court agreed that summary judgement was not appropriate at this state and reversed the trial court's decision with respect to the actual shooting.

Brenay v. Schartow / Sierras (and others), 2017 WL 4005118 (6th Cir. 2017)

FACTS: After Brenay's girlfriend obtained a protective order, he contacted her via a "few texts and a Facebook post." She contacted the Bay City police. Officers Sierras and Sgt. Schartown responded to the home and Brenay's father answered the door. He returned with his son and his wife. Brenay, Sr. opened the glass door but remained inside, with Brenay, Jr. right behind him and only a few feet from the officers. Mrs. Brenay also stood in the cramped foyer. Jr. would not come out, as the porch was wet and he was barefooted. The officers tried to talked to Jr but the parents each interjected comments and were told that the officer was "talking to your son."

From there, the stories differed, with a battle ensuing in the foyer. Ultimately, Jr. was handcuffed and taken away, charged with resisting arrest. Sr. was charged with interfering and obstructing. Both prevailed at trial.

The Brenays filed suit under 42 U.S.C. §1983 for force, unlawful entry into the house and malicious prosecution of Sr. The officers were given summary judgement. The Brenays dropped their force claim but appealed the other two.

ISSUE: May officers enter a private property on hot pursuit?

HOLDING: It depends

DISCUSSION: The Court began:

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> The government is not your nosy neighbor – the one who always pokes her head in, uninvited, to critique your garden or gossip about the couple down the street. Sure, the police, like any Girl Scout, may approach your door, knock, and ask you a question or two.[59] But the Fourth Amendment draws a 'firm line' at the door."[60] To enter, officers need a warrant, consent or exigent circumstances.[61]

With respect to the entry, the Court noted, "Sgt Schartow has an easy out: The Brenays seem to have forgotten all about him" as he was not named in the part of the claim. Officer Sierras could have obtained a warrant, but did not. There was no reason to believe Jr. would escape pending a warrant, and there was no evidence to destroy. That left the court with only the hot pursuit doctrine, which would depend upon whether Jr. was in a public place when told he was under arrest under Santana, it had not been addressed whether someone who "opens his door voluntarily – thus exposing himself to public view within inches of the doorway – loses that right. However, there was nothing that indicated that Jr. was ever told he was under arrest, before his father moved to shut the door. If the arrest was initiated after that time, then the Brenay's rights were violated. Since it could not be known what happened, summary judgement was not appropriate at the time.

The Court continued:

> Warrantless entry is the feature film in the Brenays' brief. That makes malicious prosecution the credits that roll by quickly at the end." Because they failed to support the argument that the officers made false or misleading claims in detail, that claim was forfeited.

The Court reversed the summary judgement in Officer Sierras' favor, but upheld the remainder of the trial court's decision.

Mitchell v. Schlabach, 864 F.3d 416 (6th Cir. 2017)

FACTS: On July 14, 2014, Alger County (Michigan) 911 received a call that Tim Mitchell had assaulted a man and was "heading towards Christmas" – another town. He was drinking and driving erratically. Officer Schlabach was dispatched and located Mitchell's car. He followed it into a parking lot and pulled up alongside Mitchell's car, but Mitchell then sped back out onto the highway. He "careened through residential neighborhoods, around cars, and through stop signs," at over 100 miles per hour in pouring rain. Two other officers were enroute to back up Officer Schlabach.

[59] U.S. v. Thomas, 430 F.3d 274 (6th Cir. 2005).
[60] Payton v. NY, 445 U.S. 573 (1980).
[61] Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005).

Minutes into the chase, Mitchell ran off the road into a ditch, in the national forest. The officer parked some 60 feet away, watching to see what the driver was going to do. Mitchell got out, looked toward the officer, turned away, pulled up his pants and crouched. He did not appear to be armed. Officer Schlabach drew his weapon and approached, given loud verbal commands" and Mitchell turned and walked aggressively toward the officer. (Although the dash cam did not show Mitchell's face, the court noted that it left "little room to doubt the hostility of Mitchell's approach." Schlabach backed away and Mitchell told the officer, profanely, that he was going to have to shoot him and if he didn't, that Mitchell would kill him. Schlabach tried to back up but as Mitchell closed the distance, the officer fired first, then again, and finally, Mitchell fell. Schlabach holstered and handcuffed, then ran back to turn off his siren. He returned and rendered aid, to no avail.

The Court noted that "that the situation escalated rapidly from the time Schlabach exited his car to the time he shot Mitchell." It particularly stated that while it "needed two paragraphs to describe what happened during the intervening time, it all unfolded in less than twenty seconds." Mitchell, the Estate Representative, filed suit under 28[sic] U.S.C. §1983, but the trial court gave the officer qualified immunity. The Estate appealed.

ISSUE: May a subject without a weapon still be considered dangerous?

HOLDING: Yes

DISCUSSION: The Court applied the factors in Graham v. Connor - "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight."[62] We are admonished not to assess those factors from a distance, but rather to consider that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

First, the Court agreed, the crime in question was severe – allegedly driving drunk and fighting, and then fleeing in a dangerous manner. Had Mitchell lived, he would have been charged with several serious crimes. He posed a serious threat to Schlabach, at the end of the chase, and the dash cam showed he "moved toward Schlabach with speed, purpose, and confidence despite the fact that Schlabach had a gun trained on him. Mitchell continued charging toward Schlabach even as Schlabach changed trajectories and began backing away from him. We note that Mitchell's verbal threats were unrecorded but that Schlabach testified that Mitchell said that Schlabach would "have to 'f---ing shoot [him].'" Although Mitchell did not display a weapon, he was not a "nondangerous suspect," and the officer "reasonably believed that he was in danger of serious physical harm. Finally, he was resisting arrest and clearly did not intend to "submit to arrest peacefully." All three factors weighted in Schlabach's favor.

[62] Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006).

The Estate noted that Schlabach testified in deposition that he did not believe Mitchell was armed, but "a suspect need not be armed to pose an imminent threat to an officer's safety." The Estate argued that at the moment he was shot, Mitchell was more than 21 feet away, but the Court noted that the video could not be that precise, nor did it prove dispositive either, as "one more step" would have placed him in range. The Court also discounted that Schlabach made no attempt to use any other methods to subdue Mitchell, and that once his gun was drawn, which was reasonable, it "would have been both impractical and unwise for Schlabach to have holstered his weapon so that he could attempt to use pepper spray or his nightstick against Mitchell."

The Court noted:

> The confrontation in this case was not a typical encounter between a police officer and a defiant suspect. Schlabach, the lone available officer at the time, shot Mitchell during a confrontation in the middle of an unpopulated national forest after Mitchell charged toward him in direct defiance of orders to drop to the ground. The extended, 100-mile-per-hour car chase in the rain that preceded the shooting would have heightened the heart rate, anxiety, and fear of any normal person, police officer or not. The available video evidence makes clear that Mitchell was close enough to pose a substantial threat to Schlabach's safety at the time he was shot. Even viewing the facts and video in the light most favorable to Plaintiff, we hold that Schlabach did not violate Mitchell's right to be free from excessive force because his decision to shoot was reasonable under the totality of the circumstances.

The Court noted that its decision was made much simpler and was "largely driven by the available video evidence, which documents most of the relevant events from a helpful angle." In other situations, without that evidence, summary judgement may not be possible.

The Court upheld the summary judgement in favor of the officer.

Carden v. City of Knoxville / Gerlach, 699 Fed.Appx. 495 (6th Cir. 2017)

FACTS: On the night in question, Officer Gerlach (Knoxville PD) was on patrol. He spotted Carden and a companion changing a tire by the side of the road. The officer asked if they needed help, which they declined. As Gerlach was leaving, he checked the plate, and learned it did not match the vehicle. He then pulled back in to investigate.

Gerlach asked Carden to get out of the vehicle. It quickly escalated into a fight, with Carden punching Gerlach in the chest and running. Gerlach gave chase and tackled him. They struggled and Carden tried to get to Gerlach's holstered gun. Gerlach tried to use his Taser and got tangled in the wires and became shocked himself. Carden got on top of Gerlach then got up and made as if to run. Gerlach fired on Carden multiple times, both when he was standing and on the ground. He died from six shots to the back.

Carden's son filed suit, claiming excessive force. Gerlach was denied immunity, with the court ruling that while force was justified, the use of deadly force was not, since Carden had terminated the fight and was preparing to flee.

Gerlach appealed the denial.

ISSUE: Is shooting an individual in the back generally excessive force?

HOLDING: Yes

DISCUSSION: The question, both sides agreed, was "whether Gerlach violated Carden's right to be free of excessive force when Gerlach fired on him from behind while he fled, unarmed, from an arrest for possessing a suspected stolen vehicle or for assaulting a police officer." The Court agreed that the law at the time was, in fact, clearly established that the use of deadly force against and "unarmed, fleeing felon who the officer lacked probable cause to believe posed a threat of serious physical harm."[63]

Although some force was justified, the use of deadly force was not. Even though there had possible been some attempt to gain control of Gerlach's gun, at the moment of the shooting, Carden was not doing so.

The Court upheld the denial of qualified immunity and allowed the case to go forward.

Roth v. Viviano, 2017 WL 3601721 (6th Cir. 2017)

FACTS: On November 8, 2013, at about 3 a.m., Roth suffered a seizure. Her shaking aroused her husband, Ralph, who awakened their son, Saxton. Saxton gave his mother aid while Ralph tried to call 911. He struggled with the phone so he called the police department. EMS was notified.

Officer Viviano arrived first, in response to a protocol to accompany an ambulance when possible. He entered the bedroom. Ralph denied that his wife used drugs, "by which he meant she did not do illegal drugs." Viviano continued to asked about drugs and examined her prescription medicine bottles nearby. EMS arrived and took over from Ralph, who had been holding Roth. He moved when requested and they went outside. It was later noted that the EMS did not bring in a stretcher or any medical equipment, and did not check her vital signs. Sexton later agreed his mother was confused and fighting, and "freaking out." Eventually, Saxton carried her outside to the stretcher. He noted that "Ralph and Viviano had words and Saxton had to hold his father back to keep him away from Viviano."

Roth allegedly fell from the stretcher several times, and was also dropped. Viviano handcuffed her to the stretcher. Saxton denied she struck any responders or spat at them, as alleged. Viviano

[63] Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

noted only that she was hostile in his report. She was eventually secured with straps but remained handcuffed to the stretcher until they arrived at the hospital. Saxton rode with his mother with Ralph following behind. Viviano told him to calm down and would not allow him to enter the hospital.

Roth asserted injury to her wrist, and medical testimony indicated ligament damage.

Roth filed suit against Viviano, alleging excessive force and related claims. Viviano moved for summary judgement, maintaining he was acting as a medical provider. The District Court concluded that his actions were objectively reasonable, and that even if unreasonable, were projected as unintentional conduct by a medical responder.

Roth appealed.

ISSUE: May force be used to subdue a medical subject?

HOLDING: Yes

DISCUSSION: The Court looked to McKenna v. Edgell.[64] The Court noted that looking for medications did have a medical purpose, of course. In the case of Roth, she was "clearly suffering a seizure, and was not purposefully uncooperative." The court noted that the EMTs never asked the officer to handcuff her, in this case, with one hand to the railing, or what purpose it would serve in thwarting an attempt to remove the straps. Saxton testified that she was placed face-down and both hands cuffed together.

The Court concluded that there was a genuine issue of fact as to whether Viviano was acting in a law enforcement or emergency medical responder capacity. However, the Court agreed that applying the precepts of Estate of Hill v. Miracle, the officer's actions were objectively reasonable and awarded summary judgement.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – SPOLIATION

U.S. v. Braswell, 2017 WL 3588305 (6th Cir. 2017)

FACTS: On February 23, 2014, Officers Piazza (Chattanooga PD) spotted Braswell "walking away from the bushes in front of an abandoned house in a condemned public housing project in Chattanooga, Tennessee. A car containing a female passenger was parked in front of the house. When Officer Piazza approached Braswell, he said he had come to the housing project to talk with his passenger, Jasmine Isom, and left the car in order to urinate in the bushes. Ms. Isom was

[64] 617 F. 3d 432 (6th Cir. 2010)

visibly upset, and she told Officer Piazza that she thought she was going to jail. As Officer Piazza was talking to Braswell and Ms. Isom, he noticed a strong smell of marijuana. After searching the car with Braswell's consent and not finding anything, Officer Piazza concluded that the marijuana was either concealed in the car's center console or had just been removed from the car. The officer checked the status of Braswell's license and discovered that it had been revoked. Nevertheless, he told Braswell to leave the area and drive Ms. Isom home. He also told Braswell not to drive anymore until his license was reinstated and especially not to return to the area or else he would go to jail."

Nonetheless, an hour later, Officer Piazza stopped the vehicle again, in front of the same house, having run a stop sign. This time, Braswell had a male passenger. He was arrested and searched, and found to have a large amount of cash and a digital scale. A drug dog found a bag of marijuana and a gun, right on top of the bag. The gun had no dew or dirt on it, but did have visible fingerprints, which were never tested. In the meantime, Braswell, sitting in the back of the cruiser was mumbling to himself, and the internal recording device on the dash cam indicated him intently watching the search and then muttering about the prints on the gun.

Braswell, a felon was charged with possession of the gun. He was convicted and appealed.

ISSUE: May an unintentional loss of photos lead to a spoliation instruction?

HOLDING: No

DISCUSSION: Braswell first argued the officer had no cause for the initial stop. With respect to the second stop, the officer listed out his reasons for the stop, which included no headlights and running the stop sign. Despite his arguments, the court found the officer credible and upheld the stop.

Braswell also argued he was entitled to a jury instruction on spoliation of evidence. The officer originally testified he did not take photos of the gun or the marijuana, but a video indicated that he had done so, with the items on the hood of his car. The court ordered the photos be turned over. "When court reconvened the next morning, the government informed the court that the pictures could not be produced because they were taken on Officer Piazza's personal cell phone. That phone was later given to Officer Piazza's child and dropped by the child in the bathtub. The district court found that the evidence was not destroyed in bad faith and that finding is not disputed on appeal."

Braswell argued that the civil standard for spoliation should apply, as the court agreed there was spoliation in the destruction of the photos. .

> A party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's

claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[65]

The Court however, that ""the most that has been shown is that the policemen did not maintain and control the evidence in a manner consistent with good police tactics. But there was no bad faith involved." Based on that conclusion, coupled with the unlikelihood that the fingerprints could have been recovered regardless of the officers' actions, the Court determined that the jury instruction on spoliation was properly denied.

The Court specifically noted that the destruction was due to "shoddy police work" rather than bad faith. The Court agreed that the instruction was not required.

Braswell also argued that the video from the back of the cruiser was inadmissible, because it was for the most part, unintelligible. The Court agreed that the video was admissible, and that the prosecutor's later comments on it in closing were proper. Although a transcript was not presented, Braswell argued, the prosecutor substituted his interpretation as to what was said. However, the jury had the ability to listen to the recording during its deliberation and in fact, were encouraged to do so.

Finally, with respect to the gun, the court agreed that it was reasonable to make the inference, since the evidence indicated Braswell was "seen walking away from the bushes where the gun and marijuana were found." Given that he'd been warned away from the area, his return indicated that he did so for an important purpose, to retrieve the items.

The Court upheld his convictions.

CIVIL LITIGATION

Mills v. Barnard, 869 F.3d 473 (6th Cir. 2017)

FACTS: In 1999, Mills was charged, and later convicted, of sexual conduct with a minor. As part of the process DNA had been collected, and ultimately, he was also charged with rape. The forensic investigator testified that the DNA collected almost certainly came from Mills. (However, the toxicology of the victim contradicted her report that she'd been drugged.) Mills worked through appeals and was ultimately accepted by the Innocence Project. Further testing on the items indicated that in fact, Mills was not the contributor of the DNA found on the victim's clothing.

[65] Flagg v. City of Detroit, 715 F.3d 165 (6th Cir. 2013) (quoting Beaven v. U.S. Dep't of Justice, 622, F.3d 540 (6th Cir. 2010)).

In 2014, after further proceedings, and the overturning of Mills' conviction, the state elected not to prosecute him further. He filed suit under federal law against a number of the individuals involved in his prosecution. The Court allowed the case to proceed under claims of malicious prosecution.

ISSUE: May a falsified report lead to a malicious prosecution claim?

HOLDING: Yes

DISCUSSION: The Court began:

> In Sykes v. Anderson, we set out the elements of a malicious-prosecution claim under the Fourth Amendment. Those elements are (1) "that a criminal prosecution was initiated against the plaintiff and that the defendant 'ma[d]e, influence[d], or participate[d] in the decision to prosecute'"; (2) "that there was a lack of probable cause for the criminal prosecution"; (3) "that, 'as a consequence of a legal proceeding,' the plaintiff suffered a 'deprivation of liberty' . . . apart from the initial seizure"; and (4) that "the criminal proceeding must have been resolved in the plaintiff's favor."[66]

The crux of the case was the results of the DNA test, and had it be revealed that "Mills had been excluded as the source of DNA found in C.M.'s underwear would have collapsed the foundations of the prosecution's probable cause (at least based on the account provided in Mills's complaint)." The Court agreed that the investigator's actions led to the continuing prosecution.

The Court noted that Jenkins' "intentionally falsified report" was material to the prosecution and that without that, he would not have been convicted. The court further agreed that the evidence (the non-match) was exculpatory, and "these claims map onto the requirements for a Brady[67] violation: (1) evidence favorable to a defendant (results that conclusively excluded Mills as contributor of the DNA); (2) that was suppressed; (3) and would have had a reasonable probability of changing the result of the proceeding (the corroboration of C.M.'s testimony by the DNA evidence was the basis of the jury's guilty verdicts)."

The Court agreed that "knowing fabrication of evidence violates constitutional rights."

The Court reversed the trial court's granting of the motion to dismiss.

EMPLOYMENT

Ehrlich v. Kovack, 2017 WL 4071134 (6th Cir. 2017)

[66] 625 F.3d 294 (6th Cir. 2010),
[67] Supra.

FACTS: Ehrlich, a government employee, objected to being denied the opportunity to take a training class at work, and sent email questioning the denial to her supervisor, Kovack. She was told her email was insubordinate and she responded with a letter that indicated she was aware of his use of an office printer for campaign events. She indicated she felt subjected to a hostile work environment and was under stress.

She was ultimately given a written reprimand that would be expunged after six months. Following an investigation, a Committee concluded that she had not been subjected to a hostile work environment. The sheriff was notified of her allegations regarding the use of the printer. In July, 2014, she took FMLA leave, but was placed on leave due to an ongoing investigation as to leaks from her department and he wanted time to limit her access to data. She admitted to having provided information to the opposing candidate. Ultimately, after causing a disturbance when she arrived to pick up paperwork, she was terminated.

Ehrlich filed suit on a First Amendment claim. The Court granted summary judgement to Kovack and Ehrlich appealed.

ISSUE: For a protected speech retaliation claim, must the plaintiff show the speech was the substantial or motivating factor in the adverse action?

HOLDING: Yes

DISCUSSION: The court looked to the elements of a First Amendment retaliation claim. The Court agreed that "the First Amendment prohibits retaliation by a public employer against an employee on the basis of certain instances of protected speech by the employee."[68]

> A prima facie case for a First Amendment retaliation claim raised through a 42 U.S.C. §1983 action has three elements: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct"; and (3) "the adverse action was motivated at least in part by the plaintiff's protected conduct."[69] "This inquiry is intensely context-driven: '[a]lthough the elements of a First Amendment retaliation claim remain constant, the underlying concepts that they signify will vary with the setting.' "[70]

Focusing on causation, the Court noted that to prove that, Ehrlich had to "demonstrate that her protected speech is "a substantial or motivating factor" of the adverse action.[71] Since six months had passed between the events, and because of the disturbance, the court agreed they had a separate reason to terminate.

The Court affirmed the dismissal of her claim.

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[68] Scarborough v. Morgan Cty. Bd. of Educ., 470 F.3d 250, 255 (6th Cir. 2006). "

[69] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc).

[70] Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010) (quoting Thaddeus-X, 175 F.3d at 388).

[71] Id. (quoting Rodgers v. Banks, 344 F.3d 587 (6th Cir. 2003)).

Mansfield v. City of Murfreesboro, 2017 WL 3381897 (6th Cir. 2017)

FACTS: Mansfield had been an officer for Murfreesboro, TN since 1999 and a K-9 officer since 2008. In 2011, he was involved in litigation (with others) concerning improper pay deductions. He also met with Major Hudgens concerning changes in shift scheduling that caused the Major to become so irate another officer had to intervene. It was agreed that from that point, Major Hudgens "regularly behaved unprofessionally towards Mansfield." In 2012, Major Hudgens was the subject of another lawsuit, involving sex discrimination and was warned not to retaliate against officers involved in litigation.

In 2013, a new sergeant's position was created in K-9 and Mansfield was one of a number of applicants. Ultimately, an existing sergeant who was not a handler was selected for the position, over, among others, Mansfield, who was the senior K-9 handler.

Mansfield filed suit. The District Court ruled in favor of the City and Mansfield appealed, arguing retaliation.

ISSUE: Does the plaintiff carry the initial burden in a retaliation case?

HOLDING: Yes

DISCUSSION: The Court agreed the direct evidence of retaliation was not present, as there was no evidence of blatant remarks that indicated such. Further, under the burden-shifting framework of McDonnell Douglas.[72] "Plaintiff bears the initial burden to establish a prima facie case of retaliation." "If [Plaintiff] succeeds in making out the elements of a prima facie case of retaliation, the burden of production shifts [to the employer] to articulate a legitimate, non-retaliatory reason for the termination[ ]. If the [employer] satisfies its burden of production, the burden shifts back to [Plaintiff] to show that the reason was a pretext for retaliation. Although the burden of production shifts between the parties, the [Plaintiff] bear[s] the burden of persuasion through the process.' "[73] Thus, stage one of the McDonnell Douglas analysis requires Mansfield to make out a prima facie case of retaliation; if, at stage two, the City can assert legitimate reasons for choosing Sergeant Wood over Mansfield, then, at stage three, Mansfield would have to show those reasons to be pretextual to prevail.

> "To establish a prima facie case of retaliation under Title VII, Plaintiff must demonstrate that: (1) he engaged in activity protected by Title VII; (2) his exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." "To establish a prima facie case of retaliation" under FLSA, similarly, "an employee must prove that (1) he or she engaged in

[72] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[73] Evans v. Prof'l Transp., Inc., 614 F. App'x 297, 300 (6th Cir. 2015) (emphasis added) (citation omitted).

> a protected activity under the FLSA; (2) his or her exercise of this right was known by the employer; (3) thereafter, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected activity and the adverse employment action."

Only the fourth element of the prima facie retaliation claims is disputed by the parties: causation. "In order to establish a causal connection between the protected conduct and the adverse action, a plaintiff must produce enough evidence of a retaliatory motive such that a reasonable juror could conclude that the adverse action would not have occurred but for his engagement in protected activity."[74] But even if Mansfield can demonstrate that there is a genuine issue of material fact as to causation, he cannot prevail unless he can also demonstrate that there is a genuine issue of material fact as to whether the City's reasons for choosing Sergeant Wood were pretextual.

The Court noted that there was well over a year between the incident with Major Hudgens and Mansfield, which lessoned the temporal proximity. Although there were detailed statements outlined as to Statements made by the Major in his briefs, the court noted that there was a legitimate reason to award the other candidate the position, and that it was not a pretext.

The Court upheld the summary judgement order.

TABLE OF CASES

[74] Russell v. Kloeckner Metals Corp., No. 3-13-0316, 2014 WL 1515527, at *3 (M.D. Tenn. Apr. 18, 2014) (citing Dye v. Office of Racing Comm'n, 702 F.3d 286 (6th Cir. 2012)); see Univ. of Tex. Sw. Med. Center v. Nassar, 133 S. Ct. 2517 (2013).